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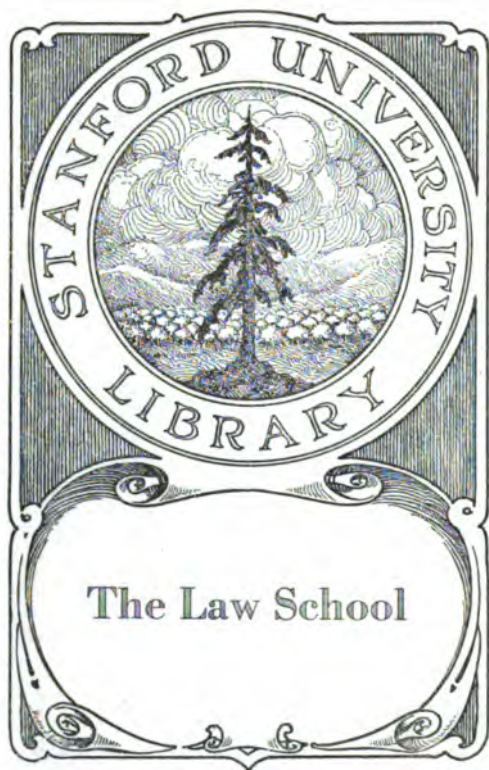
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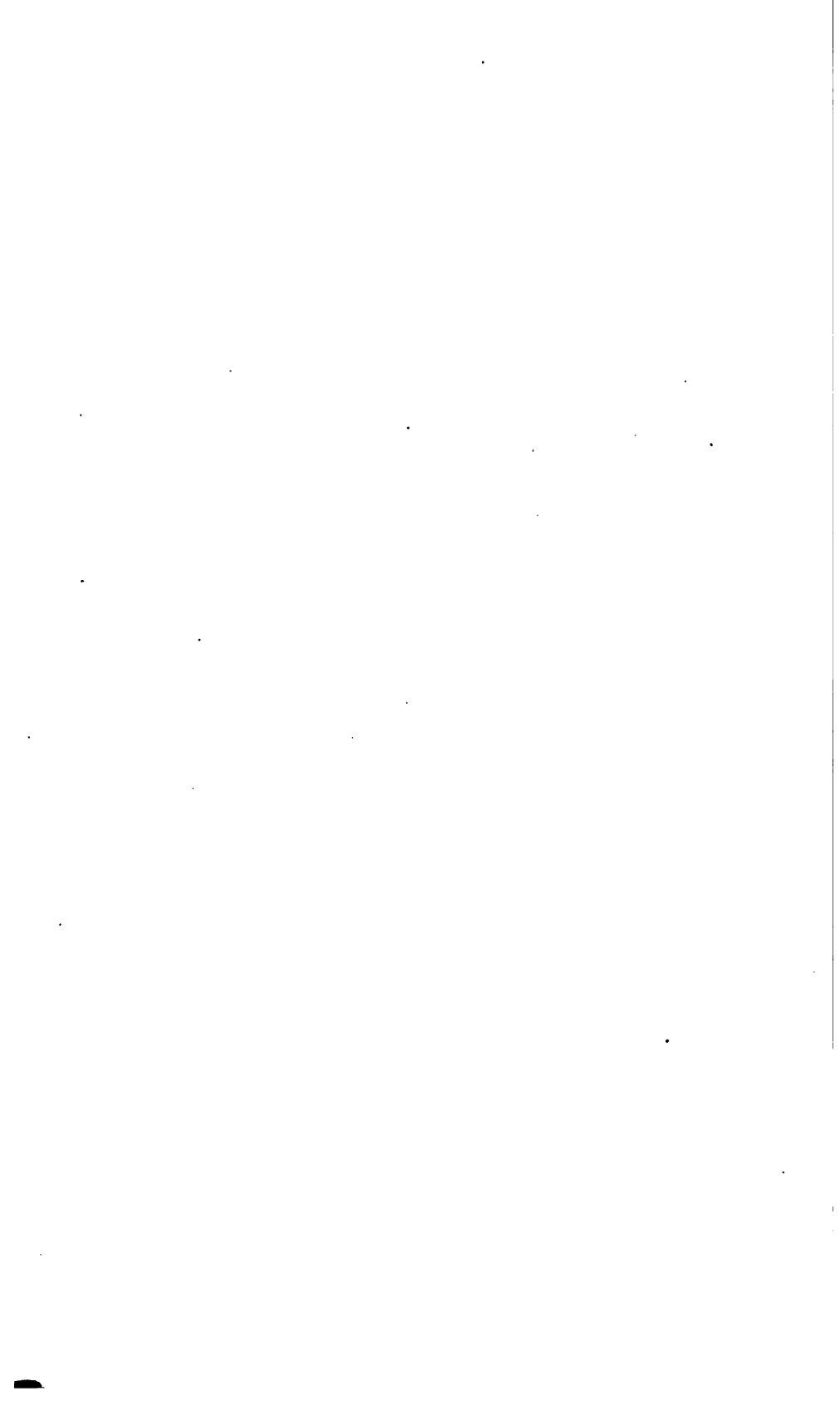
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ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

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EDITED BY

HENRY WHARTON, ESQ.

VOL. XCIV.

CONTAINING

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XXII. VICTORIA.

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VOL. V.

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CASES
ARGUED AND DECIDED
IN THE
COURT OF COMMON PLEAS,
IN
Michaelmas Term,

IN THE
XXII. VICTORIA. 1858.

Gillaspie

The Judges who usually sat in Banc in this Term, were :

COCKBURN, C. J.
WILLIAMS, J.

CROWDER, J.
BYLES, J.

MEMORANDA.

IN Hilary Vacation, 1858, the Right Hon. Lord Cranworth resigned the Great Seal, which was afterwards delivered to Sir Frederick Thesiger, Knight, one of Her Majesty's Counsel learned in the Law, who was thereupon created a peer, by the title of Baron Chelmsford, of Chelmsford, in the county of Essex.

Sir Richard Bethell, Knight, resigned his office of Her Majesty's Attorney-General, and was succeeded therein by Sir Fitzroy Kelly, Knight.

*Sir Henry Singer Keating, Knight, resigned his office of Her Majesty's Solicitor-General, and was succeeded therein by Hugh [*2 M'Calmont Cairns, Esq., one of Her Majesty's Counsel learned in the Law, who shortly afterwards received the honour of knighthood.

In Easter Term, David Power, Esq., of Lincoln's Inn, was appointed one of Her Majesty's Counsel learned in the Law.

In Trinity Term, the Hon. Sir John Taylor Coleridge, Knight, resigned his office of a Judge of the Court of Queen's Bench. He was succeeded by Hugh Hill, Esq., one of Her Majesty's Counsel learned in the Law, who was first called to the degree of the coif, upon which occasion he gave rings with the motto "Nil nisi cruce." He shortly afterwards received the honour of knighthood.

REGISTRATION APPEALS

(UNDER 6 & 7 VICT. c. 18.)

MICHAELMAS TERM 1858.

Town and County of HAVERFORDWEST.

THOMAS ROGERS, Appellant, JOSHUA HARVEY and Others,
Respondents. Nov. 11.

A., the sole lessee of a mill, took his three sons, B., C., and D., into partnership with him in the business of paper-makers. The mill was occupied by the four jointly; and they all resided upon the premises. The rent was charged to the partnership account, in which the four shared equally (the receipts, however, being given in the name of A. alone); and the four were rated, and the rates were paid out of the partnership funds:—Held, that B., C., and D. occupied “*co-tenants*,” within the 27th section of the 2 W. 4, c. 45.

At a court held for the revision of the lists of voters for the town and county of the town of Haverfordwest, Jos. Harvey, Jesse Harvey, and Joshua Harvey, duly claimed to be inserted in the list of 10*l*. occupiers for the parish of St. Martin. In each of their respective claims, the nature of their qualification was described as “one undivided fourth part of house and mills.”

The house and mills in respect of which the claims were made consisted of one building jointly occupied for many years by the claimants and their father Benjamin Harvey, under the following circumstances:—

John Evans, the owner in fee of the premises, granted a lease of them to Thomas Lloyd for ninety-nine years, terminable on the dropping of two lives, at a yearly rent of 350*l*., payable at the usual quarter-days, with a covenant by the lessee against under-letting without the license in writing of the lessor, and a proviso for re-entry on breach of any of

*4] the covenants. After this lease was granted, about the year 1830, Benjamin Harvey came into occupation of the premises by permission of Lloyd, and paid the same rent of 350*l*. to John Evans; and, on the 23d of November, 1836, Thomas Lloyd, with the consent in writing of John Evans, leased to Benjamin Harvey for ninety-nine years from the 29th of September then last past, terminable on the dropping of the same two lives, at the rent of 350*l*. per annum, payable at the four usual quarter-days, with a like covenant against under-letting and proviso for re-entry; and the rent continued to be paid by Benjamin Harvey to Evans, as before.

In 1842, the claimants entered into partnership with their father in the business of paper-makers. There was no deed of partnership, or agreement in writing. They all four built another mill at their joint expense, and carried on business at the two mills. An account was regularly kept of the receipts and expenditure; and once a year,—at first in December, and afterwards in April,—they balanced accounts of receipts and expenditure; and the profits, after deduction of the expenditure, were divided equally between the four. The rent, though payable quarterly, was only paid twice a year,—in the Spring and July,

when Mr. Evans was at Haverfordwest on other business. He received the rent due at those times himself at the mill. Entries were made in a page of the partnership book; the page being headed "John Evans, Esq.," and the items entered thus,—Paid rent, so much, with the date; and to each entry Mr. Evans put his signature on the receipt of the amount paid. These payments of rent were carried regularly to the account of expenditure, and were deducted annually from the gross profits, along with the other items of expenditure.

The four partners lived together in the house, and *the house- [*5 hold expenses were carried to the partnership account.

Up to Midsummer, 1857, the business had been carried on in the name of Benjamin Harvey alone. At that time, the firm appeared publicly as "Harvey & Sons;" and the license from the Excise was granted to the four. The rent continued to be paid in the same manner as before. Evans became aware of the existence of the partnership some time previous to 1851; and Lloyd was aware of it from the first, in 1842.

From Midsummer, 1857, the four were rated for the premises; and all the necessary rates had been paid.

The premises were of more than the clear yearly value of 40l.

In support of the objection it was urged that the claimants did not occupy *as tenants*, as required by the 27th section of the 2 W. 4, c. 45.

On the part of the claimants, it was argued that they were either joint tenants with Benjamin Harvey, or were his under-tenants: and the cases of *Rex v. Duns Tew*, 1 Burr. C. S. 398, *Rex v. Seamer*, 6 T. R. 554, and *Rex v. Tonbridge (Inhabitants)*, 6 B. & C. 88 (E. C. L. R. vol. 13), 9 D. & R. 128 (E. C. L. R. vol. 22), were cited.

The revising barrister decided in favour of the franchise, that the claimants occupied as tenants, and inserted their names in the list.

The question for the opinion of the court was, whether the relation of landlord and tenant was created between the claimants and any one by the above facts, so as to entitle them to votes under the 2 W. 4, c. 45, s. 27. If the court should be of opinion in the negative, the register was to be amended, by striking out the names of the three claimants from the above list. The three claims were consolidated.

Welsby, for the appellant.—The claimants neither *occupied as [*6 joint tenants with their father Benjamin Harvey, nor as tenants under him. It appears from the statement of the case, that Benjamin Harvey, in November, 1836, took an assignment of a lease of the premises in question from Lloyd, the lessee, and paid rent to the owner of the fee, Evans; that he afterwards took his three sons, the respondents, into partnership; and that the four carried on business at and lived upon the premises. It is clear that the respondents never became joint tenants with their father under Evans: nor is there any statement in the case that Evans was aware that the three sons lived upon the premises, or in any sense occupied them. The mere fact of the claimants being rated in respect of their occupation is not sufficient: to entitle them to be registered, they must be in the occupation of the premises "as owners or tenants" within the 27th section of the 2 W. 4, c. 45: *Heath, app., Haynes, resp.*, 3 C. B. (N. S.) 389 (E. C. L. R. vol. 91), 1 K. & G. 99. [WILLIAMS, J.—The claimants clearly did not occupy as tenants of Evans. *Power*, for the respondents, intimated that he should contend

that the claimants were under-tenants to Benjamin Harvey, the father.] There is no express tenancy: nor are there any facts stated from which such tenancy can be implied. On the contrary, the circumstance of their occupying the premises as partners, tends rather to rebut the inference of a tenancy. [The court called on

Power, Q. C., for the respondents.—The claimants occupy the premises jointly with their father, as tenants to him: the rent is paid by the four in equal proportions, as well as the rates. Each, in point of fact, is the occupier of an undivided fourth of the premises. [COCKBURN, C. J.—To whom do the claimants pay rent?] To the father. Each *7] pays a fourth, though the father *is responsible to Evans, the landlord, for the whole. [CROWDER, J.—What remedy would Benjamin Harvey have for the rent?] A remedy by action, probably: but that is immaterial. It is enough, under the 2 W. 4, c. 45, s. 27, that there is a tenancy. At all events, the father would have a remedy in equity for the rent. [COCKBURN, C. J.—Is not the occupation by the sons altogether permissive? Would they have any right to consider themselves tenants, if the business ceased to be carried on upon the premises?] So long as they occupied and paid rent, they would be tenants. That this would be a sufficient tenancy to satisfy the statute 13 & 14 Car. 2, c. 12, is clear from the cases of *Rex v. The Inhabitants of Duns Tew*, Burr. S. C. 398, *The King v. The Inhabitants of Seacroft*, 2 M. & Selw. 472, and *The King v. The Inhabitants of St. John, Glastonbury*, 1 B. & Ald. 481. In the former of these cases, the facts, which it is almost impossible to distinguish from the present case, were these:—Richard Guffkins, the pauper, was born in Sandford; and afterwards, together with John Goodwin, his father-in-law, rented a bargain at Duns Tew, at 81*l.* a year, as partners, and lived there twelve years. In 1747, they being about to leave Duns Tew, John Goodwin alone went to Mr. Keck's agent, at Little Tew, and took a farm at 52*l.* a year, for four years. After such taking, and before the farm was entered upon, Guffkins inquired of Goodwin whether he depended upon his going with him to Little Tew; to which Goodwin replied that he did, for he could not go on without him. Goodwin and Guffkins removed from Duns Tew to Little Tew with their whole joint stock, to the value of more than 100*l.*, and managed the farm together for seven years, both of them residing thereon. Keck gave his receipts for rent to Goodwin only, and once, when Keck was obliged to distrain, the distress was made upon the *8] stock which *Keck supposed to be Goodwin's only, and Goodwin alone gave a bill of sale of the stock, and Guffkins then stood by, without interposing. At the expiration of seven years, Guffkins went off from the farm, and Goodwin took the whole stock, allowing Guffkins 62*l.* for his moiety thereof. Two justices having made an order for the removal of Guffkins and his family from Little Tew to Duns Tew, which was confirmed by the sessions, a special case was stated for the opinion of the Court of King's Bench; and, after time taken to consider, Denison, J., in giving the judgment of the court, said: "We are all of us of opinion that Guffkins gained a settlement in Little Tew, upon the state of this case; for, we consider him (being taken in partner by Goodwin) as having an interest in the farm, at least as a tenant at will to Goodwin of the moiety of a farm worth 52*l.* per annum for the whole of it, and consequently his moiety above 10*l.* per annum. Therefore, we are of

opinion that Guffkins is within 13 & 14 Car. 2, c. 12, and gained a settlement at Little Tew." The case of *The King v. The Inhabitants of Duns Tew* was acted upon in *The King v. The Inhabitants of Seamer*, 6 T. R. 554, where A. agreed with B., on B.'s taking a farm of C. of the yearly value of 120*l.*, to become joint partner with B. in the stock and farm, but there was no agreement between A. and C.; and it was held that A., who lived with B. on the farm more than forty days, thereby gained a settlement,—Lord Kenyon observing, that, "whether the pauper were considered as a joint tenant with his brother, or as under-tenant, he equally gained a settlement." These cases are commented upon in Elliott on Registration, 2d edit. 209, where it is said: "Where the owner of a house wishes to create a joint tenancy between himself and partners, the usual form is for him to demise to a trustee, who then demises to the firm, by which means a *joint tenancy is created [*9 between them, and all the partners occupy with equal rights over the whole house. But it would rather appear that without such a form, where the owner or lessee of a house, &c., does any act which in point of law amounts to a demise of an undivided moiety thereof to another person, which gives such other person an equal right with himself over the whole, they become tenants in common of the house, &c.: and, unless the house, &c., be of the value of 20*l.*, neither of them can vote. Where John and Thomas Yates, brothers, agreed to be joint proprietors of a farm and the stock upon it, each contributing his share of the capital, &c.; the farm was taken by Thomas alone, but each was equally liable, as between themselves, to the rent and outgoings, and entitled to a moiety of the profits: the court held that John as well as Thomas thereby gained a settlement: John was either a joint tenant with him, or under-tenant to him of a moiety, and in either case gained a settlement: *Rex v. Seamer*, 6 T. R. 554. So, where a man and his father-in-law jointly rented a farm in Duns Tew; the father then took a farm in his own name in Little Tew, but both removed to it, and stocked and managed it jointly, and resided upon it four years: the court held that the son-in-law as well as the father-in-law thereby gained a settlement in Little Tew; although he did not join with his father-in-law in taking the farm from the landlord, he was partner with him, and must be deemed as tenant at will of a moiety of the farm: *Rex v. Duns Tew*, Burr. S. C. 398." [COCKBURN, C. J.—The words of the 13 & 14 Car. 2, c. 12, s. 1, are, "coming to settle:" it has been assumed that that means that the party must come and settle as tenant. But here we have an act of parliament introducing the word as a condition,—“shall occupy as owner or tenant.”] In what character do these persons occupy *if not [*10 as tenants? [BYLES, J.—*The King v. The Inhabitants of Seacroft*, 2 M. & Selw. 472, does not show that, to satisfy the 13 & 14 Car. 2, c. 12, the occupation must be as tenant. *Welsby*.—*The King v. The Inhabitants of St. Mary, Newington*, 5 B. & Ad. 540 (E. C. L. R. vol. 27), decides precisely the other way: there, a curate licensed by the bishop at a yearly salary, according to the 57 G. 3, c. 99, resided in the rectory-house, which was assigned to him pursuant to the same statute, and was above the value of 10*l.* a year, for more than forty days before the passing of the 59 G. 3, c. 50: and it was held, that this was a "coming to settle" within the statute 13 & 14 Car. 2, c. 12, and that a settlement was gained thereby.] In order to bring the case within the

27th section of the Reform Act, it is not necessary to make out the precise nature of the tenancy. Such a tenancy as would suffice to the acquisition of a settlement under the 13 & 14 Car. 2, c. 12, is surely enough to entitle the party to the exercise of the franchise under the Reform Act.

Welaby, in reply.—Undoubtedly Mr. Justice Denison, in *The King v. The Inhabitants of Duns Tew*, and Lord Kenyon, in *The King v. The Inhabitants of Seamer*, held, though upon the words of a statute differing from those of the statute now under consideration, that, under circumstances not materially differing from the present, a tenancy was created. But, since the case of *The King v. The Inhabitants of St. Mary, Newington*, 5 B. & Ad. 540 (E. C. L. R. vol. 27), those cases can no longer be considered to be law. The judgment of the court in *The King v. The Inhabitants of Duns Tew* is founded upon a case which did not warrant the decision. Denison, J., says: "A tenancy at will is sufficient to gain a settlement. So it was determined in 1 Sir J. Stra. 502, between the parishes of Cranly and St. Mary, Guildford, on 9 & 10 *11] *W. 3, c. 11. The reason of that case will govern this: for, there, a certificate-man agreed with the lessee of a mill, that he should occupy the mill, and pay 12l. per annum; and there was no under-lease or assignment; but, in pursuance of that agreement, the certificate-man occupied the mill two years together, and paid the rent: and it was holden, that, if this was not an absolute lease for a year (as Mr. Justice Eyre said it was, the rent being reserved as a rent for a year), yet it was undoubtedly a lease at will, which is sufficient to gain a settlement." In *Heath, app., Haynes, resp.*, 3 C. B. N. S. 389 (E. C. L. R. vol. 91), 1 K. & G. 99, it was held, that, to entitle a party to be registered in respect of an occupation as tenant, under the 27th section of the Reform Act, there must be a contract of tenancy. What contract is there here? If the three sons are tenants at will, of what are they tenants? and under whom? and what rent is reserved? It cannot be said that there is a demise to the partnership; for, that includes Benjamin Harvey himself. [BYLES, J.—Suppose A., seised in fee, demises to himself and B., what is the result?] As to A.'s share, the demise would be inoperative.

COCKBURN, C. J.—I am of opinion that the decision of the revising barrister in this case was right. The cases referred to, of *The King v. The Inhabitants of Duns Tew*, Burr. S. C. 398, and *The King v. The Inhabitants of Seamer*, 6 T. R. 554, seem to me to be authorities in point; because, though the terms of the statute upon which those decisions depended and those of the statute now in question are not identically the same, still it is plain that the court were there considering whether the relation of tenant existed; it being assumed, that, in order to gain a settlement under the 13 & 14 Car. 2, c. 12, the occupation must be as tenant. It is unnecessary for us to consider whether or not *12] the reasoning upon which those cases proceeded was well founded: we must assume the decisions to be correct: and I see no reason why more strictness should be required in defining what constitutes a tenancy for the purpose of the electoral franchise under the Reform Act, than was required for the purpose of establishing a settlement under the 13 & 14 Car. 2, c. 12. I am by no means desirous of being understood as intimating any doubt as to the propriety of those two decisions; the

view thrown out by my Brother Byles is perhaps enough to explain them. The facts of the present case are these:—Benjamin Harvey, being assignee of the lease of the premises in question, and entering into partnership with his three sons, demises the premises to the partnership at will in undivided shares: and, though true it is that a man cannot become tenant to himself, so that his share would merge in the rest, I see no reason why the demise should not enure for the benefit of the others; and then the three sons (the claimants) would be tenants in common, and all (the value being sufficient) entitled to be registered as tenants within the 27th section of the Reform Act. Whether, therefore, we deal with this case upon principle or upon authority, it appears to me that the claimants are entitled to be registered in respect of an occupation as tenants within the statute.

WILLIAMS, J.—I am of the same opinion. The short facts of the case are these:—Benjamin Harvey, being either under-lessee or assignee of a mill and premises, takes his three sons into partnership. It is a necessary part of their business as partners that they should have the occupation in common of the mill. The question is what is the position of the sons when thus put into possession of the premises as partners. I was at first disposed to think that Benjamin Harvey was alone the *tenant, and that his three sons and partners had a sort of per- [*13 missive occupation under him. If that had been so, it is clear that they would not have acquired the franchise, there being no relation of landlord and tenant, which is requisite for that purpose. But, when I find that the Court of King's Bench in two cases the circumstances of which were almost identical entertained a different view, I have no hesitation in abandoning my first impression. In the former of those two cases,—*The King v. The Inhabitants of Duns Tew*,—Goodwin was originally the sole tenant of the farm. One Guffkins was afterwards taken into partnership by Goodwin, and they jointly occupied the farm with their common stock: and the very question arose there which is raised here, viz., whether both could be considered as tenants: and the Court of King's Bench, after taking time to consider, held that Guffkins did occupy as tenant, having an interest as such in the farm, at the least as tenant at will to Goodwin of an undivided moiety. Applying the reasoning of that case to the circumstances of the present, I think it is impossible to avoid coming to the conclusion that the three sons of Benjamin Harvey had an interest in the mill and premises in question at the lowest as tenants at will to their father. The case of *The King v. The Inhabitants of Duns Tew* was recognised and acted upon in *The King v. The Inhabitants of Seamer*, 6 T. R. 554; and I think we cannot do wrong in following it. The result is that we hold that the conclusion to which the revising barrister came was right.

CROWDER, J.—I was at first inclined to think that the facts found by the revising barrister in this case did not show a tenancy in the claimants; but, upon further consideration, I am unable to avoid arriving at *the conclusion at which the rest of the court have arrived, upon [*14 the authority of the two cases of *The King v. The Inhabitants of Duns Tew* and *The King v. The Inhabitants of Seamer*. The first is in its circumstances not to be distinguished from the present. It is true that in both those cases the question arose as to the settlement of a pauper: and the contention here is, that, under the statute 13 & 14

Car. 2, c. 12, it was not necessary to the gaining of a settlement that there should be a tenancy. It is needless to discuss that upon the present occasion, because it is quite clear, that, in the case of *The King v. The Inhabitants of Duns Tew*, both court and counsel assumed it to be necessary to the acquisition of a settlement that a tenancy should exist. There, an individual took a farm, and afterwards associated another with him in the occupation, as a partner; and the question was whether the person thus introduced acquired the character of a tenant. The question here is, whether the introduction by Benjamin Harvey of his three sons into the joint occupation with him of the mill constituted them tenants. It seems to me to be utterly impossible to hold that it did not, without overruling the two cases I have referred to. It was clearly the intention of the parties that the three sons should be jointly and equally liable to the rent with the father: and it is found as a fact that the rent was regularly paid out of the partnership funds. There was, therefore, a tenancy of some sort; and, the value being sufficient to confer the franchise upon each of the partners under the 27th section of the Reform Act, the claimants were entitled to be registered, and consequently the decision of the revising barrister was correct, and must be affirmed.

BYLES, J.—I also am of opinion that the decision of the revising *15] barrister was right: and I found my opinion *upon the two cases of *The King v. The Inhabitants of Duns Tew* and *The King v. The Inhabitants of Seamer*, and especially the former. It is clear, I think, that it was not necessary for the court there to decide that a tenancy was requisite to the acquisition of a settlement under the statute 13 & 14 Car. 2, c. 12. The court, however, assumed that it was necessary. That was the ratio decidendi. The result of the transaction between Benjamin Harvey and the claimants here, is, that there was a sub-demise of the premises to the three sons as partners and tenants in common of undivided shares with their father. The decision of the revising barrister must be affirmed.

Power, for the respondents, asked for costs.

COCKBURN, C. J. (after conferring with the rest of the court).—Where the decision in favour of the respondent supports the franchise, it has been usual to allow him his costs, unless it be a case of reasonable doubt,—*De Boinville*, app., *Arnold*, resp., 1 C. B. N. S. 22 (E. C. L. R. vol. 87); *Clark*, app., *The Overseers of St. Mary, Bury St. Edmunds*, resp., 1 C. B. N. S. 23. In this case we are all of opinion that the respondents should have their costs.

Appeal dismissed, with costs.

*County of BUCKINGHAM.

[*16

THOMAS HENRY COOPER, Appellant, ARTHUR ASHFIELD,
Respondent. Nov. 16.

A. and fifty other persons became entitled by purchase from certain land-tax commissioners, under the provisions of the 42 G. 3, c. 116, each to a fifty-first part of 105*l.* 8*s.* 11*d.* of land-tax as a fee-farm rent, 104*l.* 11*s.* 4*d.* of which was charged upon land belonging to one Lee, and the remainder (17*s.* 7*d.*) upon land belonging to one Rush. In the fourth column of the list of voters, the name of Lee only was inserted as the owner of the property out of which the fee-farm rent issued, no mention being made therein of that of Rush:—Held, that, the amount of land-tax assessed upon Lee's land being sufficient to confer a right of voting upon each of the claimants, the description of the property out of which it issued was sufficient.

Seem, that the qualification was well described as a "fee-farm rent," without stating the proportion payable to the individual claimant, or alleging it to be an undivided part: but that, at all events, the misdescription, if any, was one which the revising barrister had power to amend, under the 6 & 7 Vict. c. 18, s. 40.

At the court held before, &c., to revise the lists of voters for the county of Buckingham, at, &c., Thomas Henry Cooper objected to the name of Arthur Ashfield being retained on the list of voters for the parish of Hartwell, Aylesbury.

The name of Arthur Ashfield was inserted in the list of voters for the parish of Hartwell, in the following form:—

Ashfield, Arthur,	Bath.	Freehold fee-farm rent out of houses and lands.	John Lee, Esq., Hartwell.
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The facts of the case were as follows:—On the 26th of October, 1805, Scrope Barnard and William Rickford, two of the commissioners appointed for the purposes of the act intitled "An act for consolidating the provisions of the several acts passed for the redemption and sale of the land-tax into one act, and for making further provision for the redemption and sale thereof, and for removing doubts respecting the right of persons claiming to vote at elections for knights of the shire and other members to serve in parliament in respect of messuages, lands, or tenements, the land-tax upon which shall have been redeemed or purchased" (42 G. 3, c. 116), for the county of Buckingham, contracted and agreed with William Lloyd and fifty other persons therein named, by a certain contract under their hands and seals, duly recorded in the office of the clerk of the *peace for the said county (an [*17 examined and certified copy of which was annexed to and was to be taken as part of the case), for the sale to them, in equal shares, as tenants in common, of 105*l.* 8*s.* 11*d.* land-tax, as a fee-farm rent, being the land-tax charged upon divers messuages, houses, buildings, lands, tenements, and hereditaments, with their appurtenances, in the said parish of Hartwell, in the said county of Buckingham, belonging to the Rev. Sir G. Lee, Bart., which said several premises were severally assessed in the assessment made for the said parish of Hartwell for the year 1805, at the gross sum of 104*l.* 11*s.* 4*d.*, and also upon a certain other messuage, with the appurtenances, situate and being in the said parish of Hartwell, belonging to the Rev. John Rush, clerk, which last-mentioned premises were assessed in the same assessment at the sum of 17*s.* 7*d.*, making in the whole the amount of the above sum of

105*l.* 8*s.* 11*d.*, the consideration for such contract, agreement, and sale being 3866*l.* 7*s.*, capital stock in the 3*l.* per cent. Consolidated and Reduced Bank Annuities, or one of them, to be transferred to the commissioners for the reduction of the national debt at the Bank of England, in certain yearly proportions.

By divers mesne assignments, and ultimately by an indenture bearing date the 23d of July, 1823, Arthur Ashfield became possessed in fee of the share or interest of the said William Lloyd, one of the parties mentioned in the said contract, in the said fee-farm rent created thereby as above stated.

The Rev. John Rush mentioned in the original contract was the rector of the parish of Hartwell; and, on his death, the hereditaments upon which the sum of 17*s.* 7*d.*, part of the above fee-farm rent, was charged, became vested in his successor, the Rev. Charles Lowndes, who is now, as such rector, the owner of the said hereditaments.

*18] *It was objected that one fee-farm rent alone was created by the contract above mentioned, under the operation of the statute 42 G. 3, c. 116, equal to the land-tax redeemed; that, as the respective purchasers held as tenants in common, each was only entitled to his undivided share in that one fee-farm rent; and that the nature of the qualification was consequently erroneously entered in the third column. It was also objected that the fourth column ought to have contained the names of both the owners of the properties on which such fee-farm rent was charged; and that the revising barrister had no power to alter the description of the nature of the qualification in the third column, by prefixing thereto the words "one undivided fifty-oneth [sic] part of and in a," or to insert the name of the present owner of the property originally belonging to the Rev. John Rush.

The revising barrister held that the description of the nature of the qualification in the third column was erroneous, and that he had the power to prefix thereto the words "one undivided fifty-oneth part of and in a," which he accordingly did. He also held, that it was unnecessary to insert the names of both the owners of the properties upon which the said fee-farm rent was charged, in the fourth column; and that, if necessary, he had no power to do so. He therefore refused to insert the name of the present owner of the property formerly belonging to Mr. Rush, in the fourth column.

The validity of nineteen other votes being involved in the principal decision, they were consolidated with the principal case.

Appended to the case was a certified copy of the contract for the redemption of the land-tax, enrolled with the clerk of the peace for the county of Bucks, which was as follows:—

*19] "Know all men, that we, Scrope Bernard, Esq., and *William Rickford, Esq., two of the commissioners appointed for the purposes of an act intituled, &c. (42 G. 3, c. 116), for the county of Buckingham, do hereby certify that we have contracted and agreed with William Lloyd, of Aston, in the county of Salop, Esq. (and fifty other persons), for the sale to them, in equal shares, as tenants in common, of 105*l.* 8*s.* 11*d.* land-tax, as a fee-farm rent, being the land-tax charged upon the capital messuage or mansion-house, offices, stables, and other outbuildings, courts, yards, gardens, orchards, pleasure-grounds, lawns, shrubberies, plantations, nurseries, arable, meadow, pasture, coppice.

and wood, grounds, lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell, in the county of Buckingham, belonging to the Rev. Sir George Lee, Bart., now in the occupation of William Blake, Esq., and which premises are assessed in the assessment made for the parish of Hartwell for the year 1805, as follows, viz. Sir G. Lee, Bart., proprietor, W. Blake, Esq., occupier, 14*l.* 19*s.* 7*d.* sum assessed; and upon the messuage, with the outhouses, closes, or grounds, enclosed lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of William Watkins, the elder, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, William Watkins, sen., occupier, 25*l.* 17*s.* sum assessed; and upon the messuage, with the outhouses, closes, or grounds, enclosed lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of Joseph Monk, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, Joseph Monk, occupier, 28*l.* 15*s.* 9*d.* sum assessed; and upon the outbuildings, *closes, or grounds, enclosed lands, tene- [*20 ments, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of William Hayward, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, William Hayward, occupier, 19*l.* 16*s.* 6*d.* sum assessed; and upon the outbuildings, closes, or grounds, enclosed lands, tenements, and hereditaments, with their appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the said Sir G. Lee, in the occupation of Benjamin Todd, which last-mentioned premises are assessed in the same assessment as follows, viz. Sir G. Lee, Bart., proprietor, Benjamin Todd, occupier, 15*l.* 2*s.* 6*d.* sum assessed; and also upon the messuage, with the outbuildings, yards, gardens, and other appurtenances, situate and being in the parish of Hartwell aforesaid, belonging to the Rev. John Rush, clerk, in the occupation of the said Sir G. Lee, Bart., which last-mentioned premises are assessed in the same assessment as follows, viz. Rev. Mr. Rush, proprietor, Sir G. Lee, Bart., occupier, 17*s.* 7*d.* sum assessed,—making in the whole the amount of the above sum of 105*l.* 8*s.* 11*d.*

“The consideration is declared to be 3866*l.* 7*s.*, capital stock in 3*l.* per cent. Consolidated and Reduced Bank Annuities, or one of them, to be transferred to the commissioners for the reduction of the national debt at the Bank of England, in the following proportions, and at the following times, viz. 966*l.* 11*s.* 9*d.* stock on or before the 1st of November, 1805, 966*l.* 11*s.* 9*d.* stock on or before the 1st of February, 1806, 966*l.* 11*s.* 9*d.* stock on or before the 1st of May, 1806, and 966*l.* 11*s.* 6*d.* stock on or before the 1st of August, 1806, with interest to be paid at the time of the second and each subsequent instalments to the cashier or cashiers of the governor and company of the Bank of England, equal *to the amount of the land-tax purchased, deduct- [*21 ing therefrom a sum bearing the same proportion to such land-tax as the amount of stock transferred before the time of each payment

bears to the whole amount of stock agreed to be transferred on such contract."

Joshua Williams, for the appellant.—The description of the respondent's qualification is incorrect: it should have been "one undivided fifty-first part of and in a freehold fee-farm rent out of houses and lands." In Littleton, § 314, it is laid down that, "if there be two tenants in common of certain land in fee, and they give this land to a man in tail, or let it to one for a term of life, rendering to them yearly a certain rent, and a pound of pepper, and a hawk or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distrain for this, and the tenant maketh rescous,—in this case, as to the rent and pound of pepper, they shall have two assizes, and as to the hawk or horse but one assize. And the reason why they shall have two assizes as to the rent and pound of pepper, is this,—inasmuch as they were tenants in common in several titles, and when they made a gift in tail or lease for life, saving to them the reversion, and rendering to them a certain rent, &c., such reservation is incident to their reversion; and for that their reversion is in common, and by several titles, as their possession was before, the rent and other things, which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And, inasmuch as the reversion is to them in common by several titles, it behoveth that the rent and the pound of pepper, which may be severed, be to them in common and by *22] several titles. And of this they shall have two assizes, **and each of them in his assize shall make his plaint of the moitie of the rent, and of the moitie of the pound of pepper.* But of the hawk or of the horse, which cannot be severed, they shall have but one assize, for, a man cannot make a plaint in an assize of the moietie of a hawk, nor of the moietie of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in gross by divers titles, &c." The same law is laid down in Viner's Abridgment, *Joint-tenants* (U. a.), pl. 4, and in Bacon's Abridgment, *Joint-tenants* (K). And the same rule equally holds in actions of debt and covenant: per Lord Holt, C. J., in *Midgley v. Lovelace*, Carth. 289, who says, that, "if tenants in common sever in debt, &c., they must not each of them make his demand of such a certain sum, which amounts to a moiety, but the demand must be de una medietate of the whole rent," &c. In *Rivis v. Watson*, 5 M. & W. 255,† it was held that the rent-charge may be divided by will, or by deed operating under the statute of uses, so as to make the tenant liable, without attornment, to several distresses by the devisees or cestuis que use. But it has never yet been decided that tenants in common have a right to distrain for undivided shares of a rent-charge under a common-law grant. The statute 4 Ann. c. 16, s. 27, gives to one joint tenant or tenant in common, and his personal representatives, an action of account against the other as bailiff for receiving more than his share: but, if all these were separate rent-charges, there would be no such remedy. [WILLIAMS, J.—Does not the description here, as it originally stood, sufficiently describe the "nature of the qualification?"] The authorities, it is submitted, show that it does not. In the case of a county vote,—between which and that of a borough vote a distinction is drawn by Cresswell, J., in this

respect, in Daniell, app., *Camplin, resp., 7 M. & G. 167 (E. C. L. R. vol. 49), 8 Scott N. R. 999, 1 Lutw. 264,—a correct statement of [*23 the nature of the qualification is essential: and the power of amendment reserved to the revising barrister by the 6 & 7 Vict. c. 18, s. 40, is merely “for the purpose of more clearly and accurately defining” the qualification, not to change the description of it. [WILLIAMS, J.—Certain persons are entitled to a rent-charge: the respondent claims to be one of them. Can any human being doubt that he means to say that he has a qualification in the nature of a fee-farm rent issuing out of houses and lands?] The next objection clearly is a fatal one. By the contract made with the commissioners under the authority of the statute 42 G. 3, c. 116, a fee-farm rent is created which is charged upon two several properties: and in the fourth column the name of one owner only is inserted. Now, the heading of the fourth column in the form given in the Schedule A. No. 3, directs, that, “if the qualification consist of a rent-charge, then the names of the owners of the property out of which such rent is issuing, or some of them,” shall be stated. The obvious meaning of that is, that, where the claim is made in respect of a rent charged upon property belonging to several owners, then it shall be sufficient to state the names of some of them; not that, where the rent is issuing out of *several properties*, it shall be sufficient to name the owner of one of them. That clearly would not give the information which the statute requires shall be given. Some or one of the owners of each of the several properties out of which the rent-charge issues, if it be charged upon several, must be given.

Overend, Q. C., for the respondent.—[WILLIAMS, J.—We are all of opinion that there is nothing in the first point. As to the other point, the difficulty I feel is this,—The *act of parliament requires the [*24 party claiming the franchise to give such a description of the nature of his qualification as will enable third persons to investigate it. A person wishing to inquire into the sufficiency of the claim here, might go to Mr. Lee, and, finding that so far as concerned his property, the qualification was insufficient, would have a right to conclude that his investigation was at an end, and would make his objection accordingly: and, when he appeared before the revising barrister to support his objection, he would be met by another rent-charge issuing out of some other property.] All that the statute requires, is, that substantial notice shall be conveyed as to the nature of the qualification upon which the claim to be registered is founded. The inquiry here would be satisfied by an inspection of the contract, to which access may be had at the places where by the 164th section of the 42 G. 3, c. 116, they are required to be registered. [CROWDER, J.—If your argument be correct, it would seem to be enough to make a reference to the deed.] The contract is entire: it creates one entire rent-charge issuing out of the whole property owned by several persons. It is enough if such information is given by the claimant as will suffice to put an objector in communication with any one of the persons who are interested in the whole property charged. The word “owners” in the schedule means owners in the largest and most liberal sense. The property here the name of the owner of which is omitted, is charged with only 17s. 7d. per annum: and there is more than enough to give each of the claimants 40s. a year out of the land of the person named. [WILLIAMS, J.—West, app.,

Robson, resp., 3 C. B (N. S.) 422 (E. C. L. R. vol. 91), shows that the charge may be apportioned.]

Joshua Williams, in reply.—[WILLIAMS, J.—The sole question is, *25] whether the claimant has the qualification *he has described.] It is submitted that he has not. The rent-charge is issuing out of the whole and every part of the land upon which it is charged. If the court sanction apportionments otherwise than as between lands in different counties, as was done in *West*, app., *Robson*, resp., it will give rise to very inconvenient questions in many cases. In the case referred to, the apportionment was inevitable: but that is totally different from a case where the whole lands charged lie in one county. [WILLIAMS, J.—Does any part of the rent-charge which constitutes the claimant's qualification issue out of *Lowndes's* land? Are they not separate assignments of each?] If so, the claim should have been for several rent-charges. [WILLIAMS, J.—We can only decide the point which is submitted to us.]

WILLIAMS, J.(a)—I am of opinion that the decision of the revising barrister was right, and must be affirmed. As to the first objection, viz. the alleged misdescription of the qualification in the third column of the list, the ground of complaint is, that, instead of describing the qualification as "freehold fee-farm rent out of houses and lands," the party should have called it "one undivided fifty-oneth part of and in a freehold fee-farm rent out of houses and land." I doubt very much whether the description as it stands does not comply with the statute, inasmuch as I conceive that all that is required is, that substantial information shall be given as to the nature of the voter's qualification; and, when it is stated that the vote is claimed in respect of a freehold fee-farm rent issuing out of houses and lands, I think that is enough. But I am clearly of opinion that the revising barrister had power to amend, if amendment was necessary, and that the amendment which he made dis- *26] posed of the *question. The statute plainly intended, that, where the description in the third column avers a particular qualification, so that there is no doubt as to what is meant, but there is a slight inaccuracy or the absence of some particularity which is not of the substance of the thing, the revising barrister was to have power to amend it so as to make the description perfect. As to the other objection, it occurred to me at first that it would be difficult to get over it; for, though I agree to a certain extent with the argument which has been urged by the learned counsel, I think, that, when the act of parliament says, that, "if the qualification consists of a rent-charge," it shall be sufficient to state "the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property," it means some of the owners of the whole property out of which the rent is issuing; and not that, where the claim is in respect of a rent-charge issuing out of several properties, it shall be enough to name the owner of one of the several properties. But, passing that by, another question is raised. It is said that the public have a right to demand that the qualification of the claimant shall specify the property in respect of which he claims the franchise, so that a person may ascertain by means of the description what the property is in respect of which the franchise is claimed, and see whether or not it is a proper case for an objection;

(a) Cockburn, C. J., was absent, on account of indisposition.

whereas, if it be sufficient to name only one portion of the property in respect of which the franchise is claimed, a party relying on the insufficiency of the part named to found a claim to the franchise, may be induced to object, and, when he comes before the revising barrister, he may be met by an additional qualification which he could not have anticipated, and therefore could not have inquired about. I do not think that this is answered by the suggestion of Mr. **Overend* [27 that an inquiry would lead to an inspection of the deed by which the rent-charge is created. I think the party ought to be able to ascertain without referring to the deed whether the property is or is not sufficient to confer the franchise. But the short answer to the objection is this:—You may, and I think ought to, assume that the claimant has no right to go out of the description which he has given in the fourth column. Taking that to be so, it appears that Mr. Lee, of Hartwell, whose name appears in the fourth column, has property which is subject to a rent-charge to the amount of 10*l.* 11*s.* 4*d.* per annum, of which the claimant is entitled to one undivided fifty-first part. Therefore it seems to me that the claimant is entitled to say before the revising barrister, “I claim to be inserted in the list of voters in respect of a rent-charge of the required amount issuing out of the lands which I have described.” He has named the property out of which issues a rent-charge of sufficient amount to confer upon him the franchise. If it had been necessary, in order to make up a sufficient amount, to have recourse to the rent-charge issuing out of the lands of Mr. Lowndes, I think the objection would have been fatal. It seems to me that it is a fallacy to treat this as if it were the case of an entire rent-charge issuing out of the whole and every portion of the lands in question. Here is a public act of parliament enabling the commissioners of the land-tax to sell the burthen which is imposed upon the land. There are two modes by which this may be effected,—the owner may redeem the tax assessed upon his land, or the commissioners may, as was done here, sell and assign it to a stranger. The commissioners here have assigned to the claimant and his associates the two burthens imposed upon two separate properties. That on the lands of Mr. Lee amounts to 10*l.* 11*s.* 4*d.*, of which the claimant is **entitled* to one fifty-first part, and that is enough to confer on him a vote. I therefore think the revising barrister was [28 right in holding that it was not necessary to insert the name of Mr. Lowndes in the fourth column.

CROWDER, J.—I am of opinion that the decision of the revising barrister upon both the points which were before him was correct. As to the first, it was objected that the nature of the qualification was improperly described in the third column of the list as “freehold fee-farm rent, issuing out of houses and lands.” Looking to the statement of facts, it appears that the claimant has a fee-farm rent exceeding the value of 40*s.* per annum issuing out of freehold houses and lands. I think the description is sufficient without any amendment. But, if an amendment was necessary, I think the revising barrister had a right to amend the description. By the proposed amendment, he would not be altering the nature of the qualification, because the claimant equally claims and has a fee-farm rent issuing out of the lands, whether it be an entire rent payable to himself, or a rent payable to him as one of fifty-one claimants. The other objection related to the fourth column. It

is alleged, that, as there are two owners of the property out of which the rent-charges issue, the names of both should have been mentioned. I do not think it necessary to give any opinion as to how that would have stood if the rent-charge issuing out of the land of Mr. Lee did not give a sufficient amount to entitle each of the fifty-one purchasers to 40s. a year. If it had been necessary to determine that, I should have desired time for deliberation. But I agree with my Brother Williams that it sufficiently appears that there is a statutory rent-charge to the amount of 104*l.* 11*s.* 4*d.* issuing out of Mr. Lee's land: and, as the *29] claimant, as one of the fifty-one purchasers under the statute, is *entitled to 40s. a year thereout, he is clearly entitled to be registered in respect of it, and that there was no necessity for the insertion of the name of Mr. Lowndes. I therefore think the decision of the revising barrister was right, and must be affirmed.

BYLES, J.—With regard to the first objection, I should have thought the description good enough as it stood: but, at all events, it amounts only to an inaccuracy of description, which was amendable by the barrister under either the 42d or the 101st section of the 6 & 7 Vict. c. 18. As to the second objection, viz. that the land out of which the rent-charge is issuing, is not properly described,—I cannot help thinking that what my Brother Williams has pointed out is the true effect of the transaction as set forth in the case, viz. that there are two rent-charges,—one for 104*l.* 11*s.* 4*d.* issuing out of lands of Mr. Lee,—and another for 17*s.* 7*d.* charged upon the land of Mr. Lowndes: and, if that be so, the description here is the only one that would be accurate. But, if that be not so, then arises the question what is the meaning of “owners” in the schedule to the act. It is not necessary to pronounce any opinion upon that: but I must confess I should require time for consideration before I should be disposed to cut down the meaning of “owners” to “owners of undivided property.” It would be a highly inconvenient construction; for, it might be impossible to obtain the names of the owners of every property included in the charge. Upon the whole, I think the description of the rent-charge in the third column was correct; and, for the reasons pointed out by my Brother Williams, that the description in the fourth column was also correct.

Decision affirmed, with costs.

*30]

*County of HUNTINGDON.

HENRY HOWITT, Appellant, EDWARD STEPHENS, Respondent.
DAVID BRITAIN, Appellant, JOSEPH WILCOCKS, Respondent.
Nov. 16.

In a list of claimants for a county, A.'s qualification was described in the third column as “50*l.* occupier,” and in the fourth column the property was described as being situate in “Cambridge Road:”—Held, a sufficient description: but that, at all events, if insufficient, it was amendable under the 40th section of the 6 & 7 Vict. c. 18.

At a court held on the 6th of October, 1858, for the revision of the lists of voters in the election of knights of the shire for the county of

Huntingdon, the name of Henry Howitt was duly objected to. His name appeared on the list of claimants for the parish of St. Neots, as follows:—

No.	Christian name and surname of each voter at full length.	Place of abode.	Nature of Qualification.	Street, lane, or other like place in this parish (or township) and number of house (if any) where the property is situate, or name of the property, if known by any, or name of the occupying tenant, or if the qualification consists of a rent-charge, then the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property.
1957	Howitt, Henry.	St. Neots.	50 <i>l.</i> Occupier.	Cambridge Road.

It appeared that Henry Howitt had occupied for a sufficient time prior to the 31st of July last a farm on the Cambridge Road, in the parish of St. Neots, for which he was bonâ fide liable to a yearly rent of not less than 50*l.*

It was objected that the qualification as stated in the third column was insufficient in law to entitle Henry Howitt to vote: and the revising barrister held that the objection was valid.

*The revising barrister was then applied to on the part of the [*31 voter to amend the qualification, by striking out "50*l.*," and inserting in lieu thereof "farm, as," so that the qualification, as amended, would stand thus, "Farm, as occupier." The revising barrister held, that, under the 40th section of the 6 & 7 Vict. c. 18, to which he was referred, he had no power to do so; and he expunged the name from the list.

If the court should be of opinion that the qualification as stated in the list was sufficient, the name was to be reinserted in the list: or, if the court should be of opinion that the revising barrister had power to amend the qualification, then the third column was to be amended as above stated.

At the same court the name of David Brittain was also duly objected to; and his name appeared on the list of claimants for the parish of Eynesbury, as follows:—

No.	Christian name, &c.	Place of abode.	Nature of Qualification.	Street, &c., where property situate, &c.
537	Brittain, David.	Eynesbury.	50 <i>l.</i> Occupier.	Eynesbury Field.

Edward Stephens was the objector to Henry Howitt's name, and Joseph Wilcox was the objector to the name of David Brittain: and, the cases being the same in all respects, they were consolidated.

Stephenson (with whom was *Kinglake*, Serjt.), for the appellant.—The description in the list "50*l.* occupier" was sufficient; or, if not, the revising barrister ought to have amended it, under the power conferred upon him by the 40th section of the 6 & 7 Vict. c. 18. The 20th

section of the Reform Act, 2 W. 4, c. 45, enacts "that every male person of full age, and not subject to any legal incapacity, who shall be *32] entitled, either as *lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same, or for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 50*l.* over and above all rents and charges payable out of or in respect of the same, or *who shall occupy as tenant any lands or tenements for which he shall be bond fide liable to a yearly rent of not less than 50*l.**, shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament for the county, or for the riding, parts, or division of the county, in which such lands or tenements shall be respectively situate: Provided always that no person, being only a sub-lessee, or the assignee of any under-lessee, shall have a right to vote in such election, in respect of any such term of sixty years or twenty years as aforesaid, unless he shall be in the actual occupation of the premises." [BYLES, J.—What is the objection to the description of the qualification?] The objection is that the claim is not stated to be in respect of the occupation of lands or tenements. The description, however, as it stands, could only refer to an occupation of lands or tenements: it could not mean an occupation of a rent-charge. In Judson, app., Luckett, resp., 2 C. B. 197 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 490, this court held that the description of the qualification need not adhere rigidly to the words of the 27th section of the Reform Act. Besides, the description *33] is aided by that of the local situation of the *property given in the fourth column. At all events, this was a mere inaccuracy of description, which was amendable under the 40th section of the 6 & 7 Vict. c. 18.

Grant, for the respondent.—The objection resolves itself into a question of fact, upon which the revising barrister's exercise of discretion is final (Wood, app., *The Overseers of Willesden*, resp., 2 C. B. 15 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 314), or it is a matter of law upon which he has ruled correctly. The qualification as stated is clearly insufficient. The legislature did not by the Registration Act, 6 & 7 Vict. c. 18, intend to require a less strict description of the qualification in respect of which a party claims to be registered, than was before required under Sched. (H.) No. 3, of the Reform Act. The 38th section of that act requires a list of claimants to vote for the county, to be made out according to the form numbered 3 in Sched. (H.): and there in the third column, under the heading "Nature of qualification," we find "50 acres of land, as occupier," and in the fourth column, under the heading "street, &c., where the property is situate," we find "Highfield farm:" so that, upon the whole, there is a complete description of the property and of its local situation; giving the means of inquiry where necessary. That is wanting in the present case. The description here would be equally applicable if the claimant had been an occupier to the value of 50*l.* a year under several landlords; and

that clearly would be an insufficiency of description which the revising barrister would have no power to amend: Bartlett, app., Gibbs, resp., 7 Scott N. R. 609, 5 Man. & G. 81 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 73; Daniel, app., Camplin, resp., 8 Scott N. R. 999, 7 M. & G. 167 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 264. The different uses of the third and fourth columns in the schedules are *pointed out by the court in Hitchins, app., Brown, resp., 2 C. B. 25 (E. C. L. R. vol. [*34 52]; 1 Lutw. Reg. Cas. 328,—the fourth being an exposition or more particular description of the qualification the nature of which is stated generally in the third column. Here, the fourth column does not rectify the vagueness of the third. [WILLIAMS, J.—The decision in Bartlett, app., Gibbs, resp., proceeded upon the ground that there was a total omission of part of the qualification.] There is the like omission here. [WILLIAMS, J.—The question is, whether it is a misdescription or a partial omission. If the revising barrister sees that the party meant truly to describe the nature of his qualification, and has by mistake or inadvertence failed to do so, he may amend the description.] There is no mistake here. The real question is, has the claimant given such a description of the nature of his qualification as to enable parties interested in the inquiry to ascertain its sufficiency? In Onions, app., Bowdler, resp., 5 C. B. 65 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 59, it was held that the 6 & 7 Vict. c. 18, s. 40, empowers the revising barrister to insert the qualification of a voter in the list, where it has been *wholly* omitted, or to amend the description where it is insufficiently stated; but it does not authorize him to amend a qualification imperfectly stated, by adding a *new* qualification. There, in a list of borough voters, the qualification of the appellant was described in the third column as "house in succession," and, in the fourth, to be situate in "Butcher Row." It appeared that the qualification in truth consisted of the successive occupation by the party of two houses, one in Butcher Row, the other in Coleham, in the same borough; and the revising barrister was called upon to amend the description by adding an *s* to the word "house" in the third column, and inserting "Coleham" in the fourth; which he declined to do: and it *was held that the pro- [*35 posed amendment was not one which it was competent to the revising barrister to make. [WILLIAMS, J.—The decision there was in accordance with that of Bartlett, app., Gibbs, resp. The court say that it was not a case of omission, but a false description of the qualification. Can there be a doubt as to what the party meant here?] That may be so; but the statute requires that the description shall be sufficient to give the means of inquiry. Wilde, C. J., in Onions, app., Bowdler, resp., says,—“The Reform Act having conferred the right of voting in respect of the occupation of premises of a certain value, and occupied in a certain character, it was reasonable that those who are interested in preserving the purity of the register, should have the means of ascertaining, by inquiry, whether the premises are of sufficient value, and the nature of the occupation such, as to entitle the party to exercise the franchise.” [CROWDER, J.—In no case where an amendment is necessary can it be said that the means of inquiry are given. This is a mere mistake: there is nothing to induce the court to believe otherwise. BYLES, J.—The revising barrister finds as a fact that the appellant “had occupied for a sufficient time prior to the 31st of July last a farm

on the Cambridge Road, in the parish of St Neots, for which he was bonâ fide liable to a yearly rent of not less than 50*l.*”]

Stephenson, in reply.—All the cases cited have reference to borough votes. The case of *Daniel*, app., *Camplin*, resp., 8 Scott N. R. 999, 7 M. & G. 167 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 264, points out the distinction between county and borough qualifications. The question reserved here is a question of law, whether “50*l.* occupier” is a sufficient description of a qualification under the 20th section of the Reform Act.

*36] [BYLES, J.—The *objection seems to have been, not that there was nothing to identify the property, but that it was an illegal and insufficient statement of a qualification.] The revising barrister has followed the words of the 40th section of the 6 & 7 Vict. c. 18.

WILLIAMS, J.—I am of opinion that the revising barrister was wrong in the view which he took in this case, and that the claim of the appellant ought to have been allowed. Looking at the terms in which he has stated the case, he appears to have proceeded upon the earlier part of the 40th section of the 6 & 7 Vict. c. 18, by which he is directed to expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote. He appears to have considered that the qualification as stated was insufficient to entitle the claimant to vote. I am of opinion that he was mistaken in the conclusion to which he came. It seems to me to be impossible to doubt that the claimant meant to point to a qualification under what is commonly called Lord Chandos’s clause, the 20th section of the Reform Act. I feel bound to say that I think it would be very mischievous if the revising barrister were permitted to hold that the claimant is bound to describe the qualification in respect of which he claims to be registered in the terms which a lawyer would use; and that, in my opinion, it is sufficient if he describes it so that a man of ordinary sense could not mistake his meaning. Here it is, I think, impossible to doubt that the claimant means to say that he is entitled to be registered in respect of that sort of qualification which a man has who occupies lands or tenements as tenant at a rent of 50*l.* per annum. The language of the 20th section of the 2 W. 4, c. 45, is, I think, strong to show that *37] the legislature did not intend that the description of the *qualification should go further than was necessary to convey to the mind of any person of good sense what was the nature of the qualification in respect of which the claimant claimed to be entitled to a vote. The example given in the schedule is, “50 acres of land as occupier,” not saying that the occupation is in the character of tenant, or that the amount of the rent is 50*l.* per annum; but it is such a description as points to that clause. But, assuming that there is in the present case sufficient to point to what is a legal qualification, and therefore that the case does not fall within the first part of the 40th section, there is an insufficiency in the description of the qualification of by no means a trifling character. The appellant claims, with reference to the 20th section of the Reform Act, in respect of a qualification as a 50*l.* occupier in Cambridge Road; he does not say whether he is an occupier of lands or tenements. I take it to be the same thing as if he had said that he claimed as “occupier of a tenement,” without saying what tenement. But it appears to me, that, when such point arose, the duty of the revising barrister also arose with reference to another part of the 40th

section. He then had to consider whether the nature or description of the qualification was insufficiently described for the purpose of being identified. Upon this he has not exercised any discretion. If he thought the description sufficient for the purpose of identification, there was an end of the objection: but, if he thought it insufficient for the purpose of identification, he ought upon the materials before him to have amended by inserting the proper description of the qualification. Several cases have been cited on behalf of the respondent; but I do not think that any of them apply here. The distinction which they establish is this, that the 40th section of the 6 & 7 Vict. c. 18, applies only to cases where there has been an *inaccurate or insufficient description of the claim relied on, and not to cases where there is a total omission to state some part of the description of the qualification which is an essential foundation of the claim. It is impossible, I think, in the present case, to doubt that the claimant meant to describe the whole of the property in respect of which he claimed to be registered. He did not, by asking the revising barrister to amend, seek to add a qualification, but he sought to give a more complete and accurate description of the qualification which was before insufficiently stated. I think the case was a proper one for amendment under the 40th section, and that the decision of the revising barrister was wrong, and must be reversed.

CROWDER, J.—I am entirely of the same opinion. The description of the qualification in the third column, “50*l.* occupier,” could not reasonably give rise to a doubt as to the nature of the qualification intended to be relied on: it clearly indicated a claim to be registered under the 20th section of the Reform Act. The revising barrister seems to have thought the description insufficient in law, and therefore that he was bound to expunge the name from the list. I agree with my Brother Williams, in thinking that he was wrong. The propriety of the description seems to have been made a matter of inquiry before the revising barrister, and he appears to have come to the conclusion that the party claimed in respect of the occupation as tenant at 50*l.* a year of a farm in the Cambridge Road. He was called upon to amend by inserting the true description of the qualification in respect of which the claim evidently was made. I think he was clearly wrong in refusing to make the amendment asked: and consequently his decision must be reversed.

BYLES, J.—I also think that the decision of the *revising barrister in this case was wrong. I must confess I was unable from the first to entertain much doubt upon the matter. I read the third and fourth columns together; and, so read, the claim stands thus,—“My qualification is as an occupier” (which, *ex vi termini*, means an occupier of real property), “and I claim in respect of an occupation at the yearly rent of 50*l.*; and the property in respect of the occupation of which I claim, is situate in the Cambridge Road.” That clearly points to a claim under the 2 W. 4, c. 45, s. 20. And I must own I think it states all that the statute requires. It is not necessary to state whether the qualification consists of an occupation of a house or of land. The value of the property and its situation are given. I must confess I think the description well enough as it stood. “50*l.* occupier” has been frequent in claims, and for years has been kept also in the lists. At all events, if the description was insufficient, it was aidable by amendment.

Appeal allowed, without costs.

*40]

*Borough of NEW WINDSOR.

ANDREW HEARTLEY and Others, Appellants, WILLIAM
HENRY BANKS, Respondent. Nov. 11. .

The military or poor knights of Windsor have not such an "office," or such an interest in the houses occupied by them, as to entitle them to be registered for the borough, under the 2 W. 4, c. 45, s. 27.

At a court held for the revision of the lists of voters for the borough of New Windsor, William Henry Banks objected to the name of Andrew Heartley being retained on the list of voters.

The facts of the case were as follows:—The name on the register stood thus,—

Heartley, Andrew.	Lower Ward.	House.	Lower Ward.
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Andrew Heartley occupied a house as one of the Military Knights of Windsor. He claimed under an appointment which is hereunto annexed, as follows:—

"Victoria Regina.

"Victoria by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the Faith, and sovereign of the most noble order of the Garter, To our right trusty and well-beloved, the Honorable and Very Reverend Lewis Hobart, clerk, doctor of divinity, dean, and to our right trusty and well-beloved the canons of our free collegiate chapel of St. George, within our Castle of Windsor, greeting: Whereas it hath been made to appear to us that Captain Andrew Heartley is a fit object of our Royal charity: In consideration thereof, We do by these presents give and bestow upon you the said Captain Andrew Heartley the place of one of our Military Knights of Windsor, now vacant by the death of Captain Charles Langford, lately one of our Military Knights there, with the same rooms, foundation, and
*41] *house that the said Captain Charles Langford enjoyed, Together with all rights, privileges, profits, and emoluments unto the said place of Military Knights any ways appertaining and belonging, in as full and ample mode as the said Captain Charles Langford held and enjoyed the same: And, although he is a married man, yet, We, being duly informed of the rules of our said most noble order, do hereby dispense with them in this case: And accordingly we will and require you the said dean and canons the said Captain Andrew Heartley to swear and install into the place of Military Knight aforesaid within our said Castle of Windsor, *To possess and hold the same during the term of his good and statutable deportment therein.* Given at our court at Windsor Castle under sign-manual and the seal of our most noble order of the Garter, this 14th day of November, in the year of our Lord 1840, and in the fourth year of our reign.

"By the Sovereign's command,

"R. OXFORD, C. G."

The governor produced a book which contains the governing regulations of the charity. These were as follows:—

"The statutes of the Military Knights of Windsor.

"30th August, anno primo Elizabeth. The Queen, minding the con-

tinuance of the foundation erected by King Edward the Third, and as near as might be the performance of the intent of Her progenitors, and advancement of the most noble order of the Garter, and especially of the knowledge given Her of the last mind and will of Her father, King Henry the Eighth, to make a special foundation and continuance of thirteen poor men decayed in wars and such like service of the realm, to be called Thirteen Knights of Windsor, and kept there in succession, and having also set forth and expressed therein certain orders and rules for their *better government, and declared how and in what manner the profits of certain lands, of the yearly value of 600*l.*, [*42 given and assigned by Her father to the dean and canons and their successors, should be employed for the maintenance of these poor knights and otherwise according to his mind and will, She lastly declared Her pleasure that the dean and canons and their successors should for ever cause the said orders and rules to be observed and kept, which are these that follow,—

“1. First. We do establish thirteen poor knights, whereof one to be governor of all the residue, by such order as followeth. The same thirteen to be taken of gentlemen brought to necessity, such as have spent their times in the service of the wars, garrisons, or other service of the Prince, having but little or nothing whereon to live; to be continually chosen by Us and Our heirs and successors.

“2. Item. We ordain that the governor and knights shall be chosen of men unmarried, and shall continue, except in special case where it shall please Us, the Sovereign, and the heirs and successors of Us, the Sovereign Kings of this realm, to dispense with any person to the contrary: Provided, nevertheless, if any of them will marry, he may do so, losing his place at the day of his marriage.

“3. Item. We ordain that no man defamed and convicted of heresy, treason, felony, or any notable crime, shall be admitted to any room of the said thirteen knights; and, if any so admitted be afterwards convicted of any such crime, he shall be expelled out of that company, and lose his room.

“4. Item. The same thirteen knights to have yearly for their liveries each of them one gown of four yards of the color of red, and a mantle of blue or purple cloth of five yards at 6*s.* 8*d.* the yard.

*“5. Item. The cross of St. George in a scutcheon embroidered without the garter, to be set upon the left shoulder of their mantles. [*43

“6. Item. The charges of the cloth, and of the lining, making, and embroidering, to be paid by the dean and chapter out of the revenue of that foundation and endowment given for that and other causes.

“7. Item. The said thirteen knights to come together before noon and after noon daily at all the divine service said within the college, in their ordinary apparel, and to continue to the end of the same service, without a reasonable let, to be allowed by the governor.

“8. Item. The said thirteen knights shall keep their lodgings appointed unto them, and their table together in their common hall appointed, and to have their provisions made by their common purse, except for any reasonable cause any of them be licensed to the contrary by the dean or his deputy, and that license to endure not above twenty days in no year, except it be for sickness only.

“9. Item. The said thirteen knights shall not haunt the town, the

ale-houses, the taverns, nor call any woman into their lodgings, without it be upon a reasonable cause, and that with the license of the dean or his deputy.

"10. And, further, We will that twelve of the said knights shall be obedient to the thirteenth appointed for the governor; and all thirteen shall be obedient to the dean and chapter in the observation of these statutes for the good order of themselves.

"11. Item. The said thirteen knights shall be placed within the church where the dean and canons shall think best, to hear the Divine service together, where they shall least trouble the ministers of the church.

*44] "12. Item. They shall be present at the service to be done quarterly for the memory of the patrons and founders of the said college, and specially of Our said dear father and Us, and have for every of them at each time 20*d.*, and the governor 2*s.* The said service shall be used at the four quarters of the year, every Sunday next before the quarter-day, that is to say, the Sunday next before the feast of the Annunciation of our Blessed Lady, the Sunday before the Nativity of St. John the Baptist, the Sunday before the feast of St. Michael the Archangel, and the Sunday before the Nativity of our Lord God.

"13. Item. If any of the twelve knights do not obey the governor in the observation of these statutes, he shall sustain for every time of such disobedience such forfeiture as the dean and chapter shall put on him. The governor shall make report of all such disobedience and other offences committed by any of the said knights, to the dean and chapter; and, if the offence be such as shall seem to them to require such punishment, they shall, besides a pain arbitrary, give a warning to the offender, causing the same to be registered; and he that shall so twice be warned by them shall immediately upon the third offence be expelled for ever out of that company. And, if the governor disobey the dean and chapter in the observation of the said statutes, upon such warning by them, he shall receive like punishment as the other twelve.

"14. Item. The penalties of such as are punished by the dean and chapter for not observing of these statutes shall be employed, by the discretion of the dean and chapter, upon any of the ministers or choristers of the church where they think best.

"15. When it shall please God that We or Our successors, Kings of this realm, shall repair to the Castle of Windsor, the said thirteen knights shall stand before *their doors in their apparel, to do their *45] obedience unto Us there at the coming and going away.

"16. Item. Yearly, at the keeping of the feast of St. George, they shall stand likewise in their apparel before their doors at the coming and going out of the Lieutenant and of the other knights of the order chosen for the keeping of that feast.

"17. Item. When any feast of St. George is kept within the Castle of Windsor, the governor and knights at the dinner shall sit together in their apparel as aforesaid at one table, and have allowance of meat and drink at the charges of Us, Our heirs and successors.

"18. Item. The said thirteen knights shall daily in their prayers pray for Us, the Sovereign, Our heirs and successors, and for the companions of our said order of the Garter.

"19. Item. The said thirteen knights shall all lie within their lodg-

ings provided for them; and, if any of them shall lie without their said lodgings and the college without the license of the dean or his deputy, he shall lose for every time 12*d*.

"20. Item. If any of the poor knights, after his admission into that room, shall have lands or revenues fall unto him to the yearly value of 20*l*. or upwards, he shall immediately upon the coming of such lands or revenues unto him be removed and put from his said room of a poor knight, and another such as aforesaid taken into his place.

"21. Item. The said poor knights (excepting cause of sickness) shall be every day present in the college at church at Divine service as is aforesaid, and receive there for a daily distribution of 12*d*. by the day, to be paid them monthly if it may be, or at least in such sort as the other ministers of the chapel be paid: and he that shall be absent from the church one day, without leave of the dean or his deputy, shall lose his distribution of 12*d*. aforesaid.

"22. Item. The governor shall keep a book, and therein [*46 note as well the absence of every knight from the church as other faults committed by them punishable by these statutes, whereof he shall deliver one to the dean or his deputy and another to the steward or him that payeth the poor knights, who by order of the dean or his deputy shall default at the time of their pay such sums as are set upon any of the said knights for penalties as aforesaid.

"23. Item. The dean or his deputy shall once in the year at least appoint a day and hour at which the poor knights shall be warned to be present, unto whom the said dean or his deputy, or one of the canons to be appointed by the dean, or, in his absence, by his deputy, shall read these statutes: and if any of the knights, being warned, shall be absent from that reading, without license of the said dean or his deputy, he shall lose for every time of such absence 6*s*. 8*d*.

"24. Item. The poor knights so chosen as is aforesaid, and every of them, before he take any commodity of his room, shall give a corporal oath before the dean, or his deputy, to be faithful and true to Us and to Our heirs and successors, kings of this realm, and that he or they for the time of their tarrying there shall truly observe these statutes and ordinances so far as the same concerneth them, or such other as shall be hereafter made by Us or Our heirs and successors, touching the good order of that company, upon the pains contained in the said statutes.

"25. Item. Notwithstanding the article before expressed, prescribing the aforesaid number to be chosen of gentlemen which we do most allow, yet considering that, before the perfection of these orders, We be advertised that the more part of them now chosen and admitted be not certainly known gentlemen, were received into the same order as men well reported for their honesty, and thought meet to be relieved for their *poverty, We are pleased to dispense with all such as are presently [*47 placed being not gentlemen born, and hereafter mean in that place not to have any admitted contrary to the said order."

At a chapter held at Whitehall, the 14th of January, anno 12 Car. 2, it was decreed that the five alms knights added by King Charles the First should be subject to the same rules and government under which the other thirteen were established by Queen Elizabeth's foundation, and made equal partakers of the same privileges, and have the like habit assigned them.

"June 18th, 1817.

"Present, The Hon. and Rev. the Dean, the Rev. Dr. Cookson, the Rev. Mr. Morthey, the Rev. Dr. Heath, the Rev. Mr. Champagne, the Rev. the Provost of Eton, and the Rev. Mr. Proby,

"Whereas, much inconvenience and mischief have at various times arisen from the poor knights letting or lending their houses to improper persons or for improper purposes, and there being reason to believe that the orders of chapter which have been made at sundry times to prevent those abuses are not generally known to them, they are hereby informed, by direction of the chapter, that repeated orders are entered in the chapter book strictly requiring that none of the above-named poor knights shall let or lend their houses, in the whole or in part, to any person or persons, without the consent of the dean and chapter being first had and obtained; and they are further informed that there are similar orders enjoining that no persons or goods shall be received into the college for the purpose of depriving creditors of their due, or of eluding justice in any respect: and these injunctions are enforced by penalties, the infliction of which stands recorded."

After reading the foregoing, each Military Knight takes the following oath, in obedience thereto:—

*48] "You shall swear truly to observe the statutes and ordinances that concern the government of the Military Knights, or such other as shall hereafter be made by Her Majesty and Her successors, touching the good order of the said company, so far as you are or shall be concerned in them, and the contents of this book. So help you God."

The knights are obliged to reside one month in every quarter, and cannot let or alter [change?] their houses without the permission of the board of works. The Crown does the repairs. They (the knights) are required to live and sleep in the houses. They have various duties to perform as Military Knights. By the statute, they forfeit their places on becoming possessed of property to the amount of 20*l.* a year.

The revising barrister decided that Andrew Heartley did not occupy the house in question as owner or tenant, and struck the name out of the list of voters.

The names of five other persons were struck off the list upon the same grounds; and their cases were consolidated with the principal case.

Warren, Q. C. (with whom was *Poland*), for the appellants.—The appellants in this case occupied their several houses as "owners" within the 27th section of Reform Act. By the terms of his appointment, each knight has a freehold for life, an interest of an uncertain duration: he is to hold his office or place of military knight "during the term of his statutable deportment therein:" *Co. Litt.* 42 a.; *Comyns's Digest, Estate* (E. 1); *Beetson, app., Burton, resp.*, 12 C. B. 647 (E. C. L. R. vol. 74), 2 Lutw. Reg. Cas. 225. The definition of a "place" or "office," is to be found in *The Queen v. Charretie*, 13 Q. B. 447 (E. C. L. R. vol. 66): and in *Cruise's Digest*, Vol. III., Tit. xxv., *Offices*, s. 27, it is said, that, "if an office be granted to a man quamdiu se bene gesserit, the *49] grantee has an *estate for life. For, as nothing but misconduct can determine his interest, no one can prefix a shorter time than his life, since it must be by his own act, which the law will not presume, that his estate can determine." [*COCKBURN, C. J.*—If you put this on the ground of its being an "office," it may give rise to some difficulty.

It may be nominally an office created for the purpose of a charity.] The circumstance of a compulsory residence is immaterial: *Walcot v. Botfield*, Kay 534; *Dunne v. Dunne*, 7 De Gex, M'N. & G. 207. [Cockburn, C. J.—The question seems to be, whether this is a mere eleemosynary foundation, or whether the knights have duties to perform.] The origin and nature of the institution of the Military Knights of Windsor will be found in the case of *The Attorney-General v. The Dean and Canons of Windsor*, 24 Beavan 679. Their position is a peculiar, but a highly honourable one. The knight must be a gentleman born. [CROWDER, J.—The appointment recites that the appointee is “a fit object of Our Royal charity.”] The knights have certain duties to perform; and to each a house is allotted, from which no person has any arbitrary power to remove him. In *Simpson, app., Wilkinson, resp.*, 8 Scott N. R. 814, 7 M. & G. 50 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 168, an appointment of a somewhat similar character was held to confer the franchise. The case found that Burleigh Hospital is a freehold building, divided into rooms, each of which is of the annual value of 4*l.*, and is separately inhabited by a bedesman, appointed under certain rules. Each bedesman keeps the key of his own room, and the successor of each deceased bedesman occupies the same room as did his predecessor. No charter, deed, or other document relating to the foundation could be discovered. The ordinances referred to certain feoffees and their heirs, but none were known. By these rules, which bore date the *20th [50 of August, 1597, it was, amongst other things, provided that none was to be admitted who was leprous, a drunkard, adulterer, &c., and that any one so afflicted or guilty of any of the offences specified, should be displaced; but there was no instance on record of a bedesman having ever been displaced. The bedesmen having claimed to be entitled to vote for the county in respect of their several interests, the barrister decided that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character, and that they were respectively entitled to a separate freehold estate in their rooms respectively: and this court held that his conclusion was right in point of law, and warranted by the facts. Maule, J., there says: “These bedesmen are not, like the claimants in the last case,—*Davis, app., Waddington, resp.*, 8 Scott N. R. 807, 7 M. & G. 37 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 159,—liable to arbitrary amotion, and therefore they have such an estate as to entitle them to vote.” This case is plainly distinguishable from that of *Faulkner, app., The Overseers of Upper Bod-dington, resp.*, 8 C. B. N. S. 412 (E. C. L. R. vol. 91), 1 K. & G. 132. There, pursuant to the trusts of two wills, certain lands in Northamptonshire were purchased in 1776, and vested in trustees upon trust to apply the rents and profits, amongst other charitable purposes, to and amongst certain persons described as “the six bedesmen of Daventry,” as to whose origin there was no evidence. The persons thus described had received 50*s.* a year each for the last twenty years; but they had all been appointed since the passing of the Reform Act, by resolution of the bailiffs and burgesses of Daventry, in whom the appointment had from very early times been vested, and who were also trustees under the above-mentioned wills: and it was held, that the parties so appointed had not an estate which came to them by promotion to an office within

*51] *the meaning of the 2 W. 4, c. 45, s. 18, and therefore were not entitled to be registered. In giving judgment, Cockburn, C. J., says: "There is nothing on the face of this case to show, and we cannot assume, that there are any duties attached to the appointment which would constitute it an office." And Willes, J., says: "However the matter may be stated to raise an inference that these persons may in some former time have been appointed to some office in an ancient hospital, the only conclusion one can possibly arrive at upon the statement of this case, is, that they exist now solely for the purpose of receiving their yearly stipend under the trusts of the wills referred to." [COCKBURN, C. J.—Does the newly-appointed knight always succeed to the house of the deceased knight?] By the terms of the grant here, Captain Heartley took the house which had been occupied by Captain Langford, the deceased knight. [COCKBURN, C. J.—That does not answer the inquiry: it may have been the least eligible of the residences.] This is not like the case of Clark, app., *The Overseers of St. Mary, Bury St. Edmund's*, resp., 1 C. B. N. S. 23 (E. C. L. R. vol. 87), 1 K. & G. 90, where the occupation was clearly in the character of servant. [COCKBURN, C. J.—Does it appear that these persons ever claimed a right to vote for the county before the passing of the Reform Act?] It does not. [COCKBURN, C. J.—If they are now entitled to vote for the borough as owners, they would have been entitled before the Reform Act to vote for the county.] They might not have chosen to exercise their right.

Power, Q. C. (with whom was *Murray*), for the respondent.—It is not disputed that a grant for an uncertain time operates as a grant for life. The simple question here is, whether the occupation of their houses by these poor knights is an occupation "as owner or tenant" within the 27th section of the Reform Act. *It has been held in a series of cases, that, if the occupation be compulsory, for the purpose of better enabling the party to perform services, it is not such an occupation as will confer the franchise: *Dobson*, app., *Jones*, resp., 5 M. & G. 112 (E. C. L. R. vol. 44), 8 Scott N. R. 80, 1 Lutw. Reg. Cas. 105; *Clark*, app., *The Overseers of St. Mary, Bury St. Edmund's*, resp., 1 C. B. N. S. 23 (E. C. L. R. vol. 87), 1 K. & G. 90. Here, the knights have a mere permissive occupation under the dean and canons of Windsor, in whom is vested the freehold. [CROWDER, J.—If your argument is correct, the Crown could not grant the office *with the rooms*.] The dean and chapter hold the property in trust for such persons as the Crown may direct. Whether the legal estate is in them or in the Crown, is immaterial: it clearly is not in the knights. The case of *Heath*, app., *Haynes*, resp., 3 C. B. N. S. 389 (E. C. L. R. vol. 91), 1 K. & G. 99, is precisely in point. There, the inmates of the Earl of Leicester's Hospital,—a charity regulated by a private act of parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10*l.*, of which he had the exclusive use. The appointment was for life, subject to removal for breach of any of the rules. The inmates were rated in respect of their several occupations: and it was held that they did not occupy "as owners or tenants" within the 27th section of the Reform Act, and therefore were not entitled to be registered. "It is not enough," says Cockburn, C. J., "to show a beneficial occupation, unless it be an occupation as owner or in the legal relation of tenant to

a landlord. Now, it is clear, and indeed it is conceded, that these parties do not occupy as owners,—the ownership of the property being ex concessis in the corporation aggregate. Then, do they occupy as tenants? It appears to me that they do not. There is nothing in the circumstances under which their occupation arises which creates either *expressly or by implication the legal relation of landlord and tenant. The corporation, as it seems to me, occupies in the persons [*53 of its several members. If any individual member of the body were improperly interfered with in his occupation, his only remedy would be by an application to the Court of Chancery, to have the charity administered according to the will of the founder." The occupation here is precisely of the character of that described by Tindal, C. J., in Hughes, app., The Overseers of Chatham, resp., 7 Scott N. R. 581, 5 M. & G. 54 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 51, and Dobson, app., Jones, resp., 8 Scott N. R. 80, 5 M. & G. 112, 1 Lutw. Reg. Cas. 105,—where "the officers or servants are *required* to occupy the premises with a view to the more efficient performance of the duties or services imposed upon them." Here, the duties or services, slight as they are, require the residence of the knights in the houses allotted to them. [COCKBURN, C. J.—Is it not matter of discipline rather than substantial service? WILLIAMS, J.—Suppose the church discipline acts required the dean to reside at the deanery during a given period of the year, would that alter the character of his estate?] Here, the legal ownership is in the dean and chapter of Windsor. [COCKBURN, C. J.—I see no evidence of that.] The whole tends to that conclusion. This is an appointment to an office; and, for the more convenient discharge of the duties and receipt of alms, the party is allowed to occupy the house. [COCKBURN, C. J.—Is there any authority for saying that a freehold interest held in conjunction with a right to a participation in a charitable institution gives a vote? The amount of service performed here, is practically nil.] That has not been decided.

Warren, in reply.—The circumstance that the institution is in some degree of an eleemosynary character *does not invalidate the vote: Simpson, app., Wilkinson, resp., 8 Scott N. R. 814, 7 M. & G. 50 [*54 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 168. [WILLES, J.—It appears from the statement of that case that the warden and bedesmen were dealing with the property as owners.] Here, each knight has the exclusive occupation of his house. [WILLIAMS, J.—By what assurance or deed do you contend the fee is vested in the knights?] It is enough to say that their appointment vests in them an equitable right. [WILLES, J.—I apprehend the crown could no more convey an equitable estate in land under the seal of the order of the Garter, than it could a legal estate.] This, it is submitted, is a grant of a "place" or "office," with the house or rooms and emoluments belonging thereto: and that confers such an interest as entitles the parties to the franchise under the 27th section of the Reform Act.

Cur. adv. vult.

COCKBURN, C. J., on a subsequent day delivered the judgment of the court:—

This case was argued before my Brothers Williams, Crowder, and Willes, and myself. After full consideration, we are of opinion that the decision of the revising barrister is right and must be affirmed: not that we adopt the view which was pressed upon us by the counsel for

the respondent, and which seems to have been the impression of the revising barrister, namely, that the occupation of the claimants was for the purpose of services to be rendered by them in their character of military knights. We do not find that there are any services which the claimants are bound to perform, to which their occupation of the houses in respect of which they claim to vote can be considered as subservient. The duties or obligations to which the military knights are bound, are *55] either matters of discipline or *of religious observance, with the single obligation to stand at the door of their abodes to do obeisance to the sovereign returning to or leaving Windsor Castle,—a mere mark of respect or homage which cannot be considered as an act of service; and a similar mark of respect to be shown to the governor and knights of the order of St. George, on a particular occasion.

But, although this ground of exception to the right to vote may fail, there remains to be considered the important question whether there is any occupation as owner or tenant, to entitle the occupants to vote.

It is not pretended that there is any occupation in the character of tenants: and the question is reduced to whether there is an occupation as owners. We are of opinion that there is not.

The case first submitted to us by the learned counsel for the appellant, was, that the appointment of military knight of Windsor was a freehold office, and that, the occupation of a house being annexed to it by the grant of the founder, the party holding the office had an estate for life in such house. But we are clearly of opinion that the appointment of military knight is not in any sense of the term an office. An office necessarily implies that there is some duty to be performed. Here, as we have pointed out, there are no duties which can be considered as incidental to an office. Religious observances, and manifestations of respect, by the recipients of a charity to their benefactors, cannot be held to be services which constitute an office. We must not suffer ourselves to be led away by names, however dignified or high-sounding. Although the persons deriving benefit from this royal and noble foundation, are designated by the honourable title of military knights, there is nothing whatever of knightly service connected with the institution, which *56] is one of a purely eleemosynary character. It purports *to be so by the very terms of the appointment of the object of the royal bounty; and the whole scope and object of the institution, as well as the terms and conditions on which the advantages of the royal bounty are to be enjoyed, all clearly establish the same thing. It is plain that the charitable support of men who have fallen into poverty and decay in the military service of the realm, was the primary and main purpose of the institution, and that, for that purpose, the pecuniary and other advantages incidental to the appointment were annexed to it; while, with a view to its half collegiate and half monastic character, peculiar obligations and observances were imposed. Looking to the substance of the thing, not to the name by which it has been dignified, it is plain that this is a charity,—a royal and noble charity, it is true, but still a charity, and nothing more.

The case for the appellant assumed, however, another form. It was said that the claimants, being appointed during good behaviour, have a freehold interest, and, being entitled to the benefit of the charity, and,

as part of it, to the occupation of their respective houses, have, as *cestui que trusts*, equitable freeholds in these houses.

It seems to us unnecessary to decide whether the claimants have a freehold interest or not. There being no office or franchise taken by them, a question of some nicety and difficulty would arise, if it were necessary to determine whether, as against the Crown, a person appointed to be a recipient of the benefits of this charity could maintain an absolute and indefeasible right *in rem*. But, whether the interest of these parties in the benefits of the charity be a freehold interest or not, we are of opinion that there is no such estate or interest in these houses as can properly be deemed an ownership. The legal estate is *plainly in the dean and canons of Windsor; and, though [*57] it appears that the dean and canons have power and authority to impose such restrictions on the enjoyment as to divest the occupation of the character of ownership. The knights cannot let their houses, in the whole or in part, nor even receive inmates or guests therein, except with the assent and sanction of the Dean and Canons. The language, too, of the grant, and of the statutes of the institution, speaks of the houses or rooms of the knights (for, both terms are used) in language inconsistent with the idea of ownership. Their residences are termed rooms or lodgings; and in one place the occupation is termed a "commodity." The knights are placed under the control and authority of the dean and canons, and are moreover subjected to a number of minute regulations which show that this institution is altogether of an eleemosynary character, and that the occupation of their residences was subordinate to the general objects and purposes of the charity.

It appears to us, that, if we were to hold that the occupation of a residence as part of the benefits of such a charity was an occupation as owner, we must say that any occupation of a separate residence in an almshouse, where the appointment by the grant of the founder is during good behaviour, would be a freehold occupation as owner, and, consequently, if of sufficient value, would give a right to vote,—a conclusion to which we are certainly not prepared to come.

The case of *Simpson, app., Wilkinson, resp.*, 7 M. & G. 50 (E. C. L. R. vol. 49), 8 Scott N. R. 814, 1 Lutw. Reg. Cas. 168, which was pressed on us in the argument, is a very different case from the present. In that case, no trustees were to be found. The recipients of the charity had the direct and uncontrolled management of the property in [*58] *their own hands: and the only question raised in the case was, whether the revising barrister was right in presuming a legal commencement of the estate of the bedesmen by the royal license, prior to the passing of the 39 Eliz. c. 5. There is nothing in the authority of that case which precludes us from fully considering in this whether the occupation of their houses by the military knights is an occupation as owners. We are of opinion that the characteristics of ownership are wanting, that the occupation is only as subordinate to the purposes of a charity, and subject to the immediate control of the superiors of the institution; and that it is not, therefore, an occupation as "owners," so as to satisfy the requirements of the 27th section of the Reform Act. The appeal must, therefore, be dismissed, and the decision of the revising barrister affirmed, but without costs. Judgment accordingly.

*59] *CHAMBERS and Others v. MASON.

Where a cause is compromised by the counsel and attorneys, in court, in the presence of the client, and after conference had with him with a view to an arrangement, and the client do not dissent, and the terms of the compromise have been embodied in an order of Nisi Prius, subsequently made a rule of court, the arrangement will not be disturbed, upon a suggestion by the client, that, though present when it was made, he did not understand what was going on.

THIS was an action for an alleged wrongful diversion of water from certain reservoirs of the plaintiffs.

The cause came on for trial before Martin, B., at the last Spring Assizes for the county of York, when a compromise was effected between the counsel for the respective parties, which was afterwards embodied in the following order of Nisi Prius.

"At the assizes holden at the Castle of York in and for the county of York, on Saturday, the 6th day of March, 1858, before the Hon. Sir Samuel Martin, Knight, and John Barnard Byles, Esq., serjt. at law, two of Her Majesty's justices assigned to take the next assizes according to the statute:—

<p>"Chambers and Others v. Mason.</p>	}	<p>It is ordered by the court, by and with the consent of the parties, their counsel and attorneys, that a verdict shall be entered for the plaintiff for 1s. damages, each party paying their own costs, and the defendant consenting to an order for a writ of injunction: And it is further ordered that the actions of Chambers and Others v. Richard Mason, and Chambers and Others v. Jonathan Mason, the pleas pleaded in these actions shall be withdrawn, and the plaintiffs shall be at liberty to sign judgment in each of these actions, without costs: And it is likewise ordered that Mr. John Greenwood shall pay 100<i>l.</i> to Andrew Mason, or to his attorney, on his behalf, within one calendar month from the 17th day of March instant: And it is ordered that no further action shall be brought by any of the before-mentioned person or persons against any other or others of them in respect of any matter prior to this date; Mr. William *Paget, the attorney for Richard and</p>
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*60] Jonathan Mason, and Mr. Thomas Brown, the attorney for Mr. John Greenwood, on their behalfs respectively consenting to this order: And lastly it is ordered that this order shall be made a rule of the court of Common Pleas, at the instance of either of the parties, if the said court shall see fit.

"By the court.

"BELL, associate."

Mellish, in Easter Term last, obtained a rule calling upon the plaintiffs to show cause why the verdict entered on the trial of this cause, an order of Nisi Prius made in this cause on Saturday, the 6th of March last, another order made in this cause on the 30th of March last, the judgment signed in this cause, the injunction issued in pursuance of the last-mentioned order, and all proceedings (if any) upon the said judgment, should not respectively be set aside, and a new trial be had, on the ground that this cause was compromised without the consent or authority of the defendant. The rule was founded upon the affidavits of the defendant, Andrew Mason, and of Henry Robinson, his new attorney.

The defendant deposed as follows:—"1. This action has been brought to try the rights of the several parties thereto over certain commonable

lands, and of the plaintiffs to certain water. 2. Mr. W. Paget, of Skipton, in the county of York, was my attorney in this action, and Mr. T. Brown, of Skipton, was the attorney for the plaintiffs. Mr. A. and Mr. C. were my counsel, and Mr. H. and Mr. J. were, as I have been informed and believe, counsel for the plaintiffs. 3. The action was entered for trial at the last York Assizes for the county of York, and was to have been tried by a special jury. 4. My brother, John Mason, was plaintiff in another action which was then pending, wherein [*61 *John Greenwood was the defendant, which said last-mentioned action had reference to a certain watercourse which the defendant John Greenwood had not permitted to flow in a manner in which he had covenanted or agreed with my said brother John. The said last-mentioned action was also to have been tried at the said assizes. 5. Some alteration had previously been made in the entry of the said two several causes, of the particulars of which I am ignorant, and by which the cause in which my said brother John was plaintiff, and which was a common jury cause, was set down for trial immediately before the said cause in which I was defendant. 6. I and my said brother John have paid or caused to be paid to the said Mr. Paget various sums, amounting altogether to the sum of 53*l.*, on account of the costs, charges, and expenses, of the said actions. 7. About the hour of six o'clock in the afternoon of the 17th of March last, the said common jury cause was about to come on for trial, when the said Mr. Paget came to me and my said brother John in the Nisi Prius court at York aforesaid, and said a proposition had been made to give me and my said brother John 50*l.*, and each side to pay his own expenses. I and my said brother both replied that we would not agree to that; and the said Mr. Paget then left us. I immediately afterwards saw the said Mr. Paget and certain counsellors whom I believe to have been the said Mr. H., Mr. A., Mr. C., and Mr. J., putting their heads together as if in conference. Mr. Paget then came to me and my said brother John, and said,—‘They will give 100*l.*, and pay it down in a month, each party to pay his own costs.’ Thereupon, both I and my said brother John told the said Mr. Paget that we would not agree to any such terms. My said brother John said,—‘We will either lose the horse or win the saddle;’ and I said to the said Mr. Paget that I would not agree to the terms [*62 *proposed, and that we would have the actions tried. My brother William Mason was present on both occasions when the said Mr. Paget came to me and my said brother John to communicate the said offers. 8. A few minutes afterwards the said Mr. A. and Mr. Paget with him came to me and my said brother John in court, and said, ‘Come this way,’ and I and my said brother John followed him and Mr. Paget out of court. The said Mr. A. said to me and my said brother John,—my said brother William being also present,—that we had better take the 100*l.* which had been offered as a settlement. Both I and my said brother John most positively refused to accept the sum offered, but said, that, if the parties on the other side would pay 100*l.* and all expenses which had been incurred on both sides since the commencement of the differences between the parties to both actions; we would agree to accept that sum, but we would not settle on any other terms: and we therefore desired the said Mr. Paget to go and have the said causes tried. He and Mr. A. then left us, and we went towards the witness-box, believ-

ing and expecting that the said causes would be tried; but we only saw that the jury were sworn, and heard something which we did not understand; and the business of the court for the day was ended, and the people moved out of court; and I and my said brother John went out at the same time, believing and being under the impression that the trial of the said causes had been adjourned until the next day. 9. In consequence of something which we had heard in the course of the evening of the said 17th of March as to the said causes having been settled, I and my said brother John, about 7 o'clock on the morning following, went to the lodgings of the said Mr. Paget, to inquire what had been done. Whilst waiting to see him, we learned that he had *63] gone in a cab to the railway station. I *and my said brother John ran to the station to stop him. I found the said Mr. Paget in a railway carriage just as the train was about to start, and asked him what he meant by going home, and told him that we wanted to know what was going to be done about trying the actions, as we were determined to have them tried. He said, 'I've done what I could. You (meaning myself and my said brother John) must go to Mr. A., and he will tell you all about it.' 10. I and my said brother John shortly afterwards went to the court, and in consequence of what we heard from persons about the court as to what had passed during the previous evening respecting the said actions, I and my said brother John returned home on the same day, viz. the 18th of March, and the following day we went to the office of the said Mr. Paget, and both I and my said brother John blamed him much for leaving us in the way in which he had left us. He said he would not be blamed for what had been done: he would write to Mr. A., because Mr. A. had taken it upon his own shoulders, and settled the actions without authority either from us or him. My said brother William was present, and heard this conversation. 11. I was unable to get any information from the said Mr. Paget, or from anybody else, as to the precise terms upon which the said actions or either of them had been settled; and I then employed my present attorney, Mr. Henry Robinson, to act for me in this action."

The affidavit of Mr. Robinson was as follows:—"1. On the 20th of March last, I wrote and sent to Mr. W. Paget, the late attorney for the defendant in this action, a letter, in the words and figures following:—

" 'Andrew Mason ats. Chambers and others.

" 'Special jury.

" 'Dear Sir,—The defendant called upon me this morning, and was *64] in a complete state of ignorance as *to the manner in which the case had been disposed of. He fears, from what he hears, that it has been settled by some compromise quite unauthorized by him; and he was very much astonished to find that the action was not to be tried. Have the goodness to inform me on his behalf why the action was not disposed of in the ordinary way, and at the same time state any other particulars calculated to inform me and him how the matter stands. Until I have time to confer with him after I shall have received your reply, you will of course take no further steps in the action.'

"2. In reply I received through the general post a letter from the said W. Paget in the words and figures following:—'Dear Sir,—Masons' actions. These parties were in court when the actions were settled by counsel; and they have since been fully informed as to the terms: and,

if they are not satisfied, I am sorry for it. I will hand over the papers to any other person, on payment of my bill. Of course, I shall not move further in the matter after seeing your letter.' 8. On the 24th of March last, I wrote and sent to the said W. Paget a letter in the words and figures following:—'Dear Sir,—Masons' actions. I am in receipt of your favour of the 22d instant. I assure you the parties for whom you acted are utterly and entirely ignorant of the terms of the arrangement; and I will, therefore, thank you to furnish me with copies of agreements or rules of court or other documents by which the arrangement was effected. To prevent any objection on your part, I will pay your charges for such copies, on having same forwarded to me. If, as my clients assert, the arrangements were made, not only without their authority, but against their express direction, I don't think you can insist upon retaining the papers, &c., until your bill of costs is paid: but, when I have seen the copies desired, I can the better determine what *should be done.' 4. In reply to such last-mentioned letter, I received from the said W. Paget a letter in the words and figures [*65 following:—'Dear Sir,—Masons' actions. As these parties have determined to change their attorney, I do not see why I should deviate from the usual rule, until my bill be paid.' 5: On the 27th of March, I wrote and sent to the said W. Paget a letter in the words and figures following:—'Dear Sir,—Andrew Mason ats. Chambers and others. Special jury. I am in receipt of your favour of the 25th instant, and regret that you have declined to furnish the information desired. Have the goodness to inform me whether you gave counsel in this case authority to compromise on the terms concluded upon, or any other authority to compromise, and, if any, what were the terms you authorized him to accept. Did you personally consent to any compromise? I think you will not deny that the defendant is entitled to have full information upon these points.' 6. In reply to the last-mentioned letter, I received from the said W. Paget a letter in the words and figures following:—'Dear Sir,—Masons' actions. I must decline answering any questions at present in these actions until payment of my bills, and an order to change attorneys be made.' 7. On the 20th of March last, I wrote and sent to Mr. Brown, the attorney for the plaintiffs in this action, a letter in the words and figures following:—'Dear Sir,—Andrew Mason ats. Chambers and others. Special jury. The defendant has consulted me with reference to this action, in consequence of his being dissatisfied with Mr. Paget or his counsel, or both, for having assented to some compromise, not only without his authority, but against his express directions. I have written to Mr. Paget on the subject, and for an explanation. You will please to consider that I am now the attorney for the defendant, and that for the reasons *stated above, he will [*66 refuse to carry into effect the arrangement made either by Mr. Paget or counsel, or both, under the circumstances.' 8. In reply to the last-mentioned letter, I received from the said T. Brown a letter in the words and figures following:—'Dear Sir,—Chambers and others v. A. Mason. Greenwood ats. J. Mason. I have received your communication in these several matters, under date the 20th March inst. At present, I understand Mr. Paget to be the attorney for both the above Masons, although they have applied to you, questioning his conduct as their attorney. So far as I am able to judge, the arrangement of these

actions in open court was to the advantage of Mr. Paget's clients, and was made with their assent: but it is for him, and not me, to explain his conduct. I, on behalf of my clients in both actions, was ready to try these causes, and had every confidence that the verdicts would have been recorded in favour of my several clients. And I shall certainly proceed to enforce the order of *Nisi Prius* in the first-named action.'

9. On the 24th of March last, I wrote and sent to the said T. Brown a letter in the words and figures following:—'Dear Sir,—A. Mason ats. Chambers and others. I beg to acknowledge the receipt of your favour of the 22d instant. As I am instructed, the arrangement, whatever it was,—and as to which I and my client are ignorant,—was entirely without his authority: and I shall take the earliest opportunity of bringing the conduct of the parties before the court. I shall, of course, oppose any application you may make to enforce compliance with the terms which have been agreed upon.' 10. I have not received any reply to such last-mentioned letter."

Hugh Hill, Q. C., and *T. Jones*, on a subsequent day, showed cause,
 *67] upon the affidavits of Thomas Brown, *the attorney for the plaintiffs, and of Mr. William Paget, the attorney for the Masons. The former deposed as follows:—1. The plaintiffs are tenants and occupiers, under a lease from John Greenwood, the owner, of a cotton-mill in Embsay, called Whitfield Syke, otherwise Embsay High Mill, together with divers reservoirs, mill-ponds, and streams of water appurtenant thereto, and used and occupied therewith, and also together with other hereditaments adjoining or near to the said mill. 2. I have known the said Whitfield Syke Mill forty years. It was erected, as I have been informed and believe, more than sixty years ago, and has from that time been used as a cotton-mill, worked solely by water-power until about fifteen years ago. Since then, steam-power has been added, and the said mill has been worked partly by steam and partly by water-power; and the water supplying power to the said cotton-mill flowed to it over certain commonable lands. 3. This action was brought against the defendant, and similar actions were at the same time brought against his brother, Richard Mason, and his nephew, Jonathan Mason, for repeated wilful trespasses in breaking down and damaging the dams of the plaintiffs' mill-ponds, and diverting, obstructing, and preventing the flow of the streams of water to the said mill, to recover damages for the injuries done, and to restrain the several defendants from the repetition of similar injuries. 4. This action was entered for trial at the last York Assizes for the county of York, and was to be tried by a special jury, who were required to view the locus in quo at the instance of the plaintiffs. A number of the special jurors made such view previously to the day fixed for the trial, accompanied by the under-sheriff's assistant, and attended by a person appointed as shower for the plaintiffs and by another person appointed on behalf of the defendant as his
 *68] *shower: and I, as attorney for the plaintiffs, paid the under-sheriff his charges for the expenses of such view, besides the costs and expenses of the plaintiffs' and defendant's showers. I prepared and delivered briefs to two counsel, Mr. H. and Mr. J., and subpœnaed and took to York sixteen witnesses on behalf of the plaintiffs in this cause, for the purpose and with the full intent of having this cause tried: and I was fully persuaded that the plaintiffs were entitled to and

would obtain a verdict against the defendant: and I did not by any means seek to have this action compromised. 5. The plaintiffs' landlord, the said John Greenwood, was sued by the defendant's brother, John Mason, in an action for breach of covenant in not permitting water to flow through a recent drain wrongfully diverting a stream of water from its natural course in a close the property of John Greenwood, into a close the property of John Mason, and also into another close the joint property of the defendant, Andrew Mason, and his brother, the said Richard Mason, which action was entered for trial at the said assizes, to be tried by a common jury. I was the attorney for the said John Greenwood, and delivered briefs to Mr. H. and Mr. J. in that action, and had witnesses attending the said assizes on behalf of the said John Greenwood in support of his defence; and the last-named cause came on for trial at the said assizes in its regular course as a common jury cause, on Saturday, the 13th of March, when, as the said John Greenwood was proved not to have made the covenant charged against him, the court gave the said John Mason leave to amend his declaration, by charging a breach of agreement, instead of a breach of covenant, and directed that the cause should stand over, and be tried immediately before this special jury cause, which was fixed for trial on the Wednesday following. 6. In the afternoon of Wednesday, the 17th *of March, I was in attendance in court with all the plaintiffs' [*69 witnesses, and also with the witnesses for the said John Greenwood in the said action at the suit of John Mason, when the last-mentioned cause was called on for trial; and, while the names of the jury were being called, something was said by the counsel for John Mason, and by his attorney, addressed to me and to my counsel, proposing a settlement of that action: and, as it appeared to me (and I was so advised by counsel) that the plaintiff, John Mason, must of necessity be nonsuited or a verdict pass against him in that action, and as his counsel and attorney mentioned that there were or might be several other causes of action against the plaintiffs in this action and against the said John Greenwood by John Mason and Andrew Mason and others of the family, I with my counsel objected to compromise the said common jury cause unless the special jury cause and all other pending actions and all causes of action then existing between the parties or any of them were also satisfactorily arranged; and on this basis an arrangement was made in court between the counsel and attorneys on both sides,—a juror was withdrawn in the action between John Mason and John Greenwood, each party to bear his own costs, the said John Greenwood agreeing to execute a deed of covenant, so far as concerned his own and his servants' acts only, to permit the water to flow from his close through the before-mentioned drain to the close of the said John Mason and the close of Richard and Andrew Mason, and that the said John Mason should convey the water from his close (after supplying his cattle) by another drain, in a certain line pointed out on the plan or map then produced, into the original channel from which it had been diverted, so that other parties situated lower down on the stream, who were entitled to the *flow of its entire waters, might have no cause of action against either John Mason or John Greenwood; [*70 and that John Greenwood should pay John Mason 8*l.* for the cost of such last-mentioned drain: and the purport of these terms was embodied

in an order of court, by consent. Mr. Paget, the attorney for John Mason, was present during this negotiation, and sanctioned the whole arrangement, having, as I understood, the approval of his client, John Mason. The terms of arrangement of the special jury cause and all other actions and causes of action then existing between all or any of the parties, were openly canvassed between the counsel and attorneys on both sides; and the only question in difference was, the amount to be paid by Mr. Greenwood, the plaintiffs' landlord, to Andrew Mason. There was no objection made by Mr. Paget or his counsel during the negotiation, that any right or interest of the defendant, Andrew Mason, or of his brother Richard, or his nephew Jonathan, was damaged in any way by the plaintiffs' user of their cotton-mill and the ponds and watercourses supplying the same with water: but the right of the plaintiffs to the use of those ponds and watercourses was admitted; and it was agreed that a verdict should be entered for the plaintiffs for nominal damages, and that the plaintiffs should not claim any costs; that the defendant and his brother Richard and his nephew Jonathan should be restrained from committing further trespasses, by injunction. On the question of what sum should be paid by the said John Greenwood, the sum of 100*l.* was ultimately offered by me on behalf of Mr. Greenwood; when Mr. Paget and his counsel, Mr. A., retired to confer with their clients; and, on their return, Mr. A. said the parties had authorized him to make an arrangement for them, and he agreed to accept the 100*l.* offered, which should be paid within a month, to Andrew Mason, *71] or his attorney; *and the counsel wrote down a minute of the terms of arrangement, which was signed by Mr. H., counsel for the plaintiffs, and by me for Mr. Greenwood, as his attorney, and was signed also by Mr. A., counsel for the defendant, and by Mr. Paget as defendant's attorney and as attorney for the other parties to be included in the arrangement; which minute was, I believe, handed to Mr. Bell, the associate; and the special jury in this cause were then called and sworn, and gave a verdict according to the arrangement. 7. At the time when these arrangements were made, I did not know, believe, or suspect, nor did the said plaintiffs, or the said John Greenwood, or any of them, know that such arrangements were unauthorized by the defendant, Andrew Mason, or by the said John Mason, or by the said Richard and Jonathan Mason, or any of them: but, because Mr. A. stated positively that he had seen the parties personally, and that they had expressly authorized him to make an arrangement for them, I then believed, and I still believe, that the defendant, Andrew Mason, and the said John Mason authorized the said Mr. A. to make the said arrangements and to compromise the said action for them: and, if I had doubted about the actual consent and authority of the said Andrew Mason and John Mason, I should have refused my consent to the said arrangements: and I would not, under any circumstances, as Mr. Greenwood's attorney, have consented to arrange one of the said actions, without having the other arranged also; for, Mr. Greenwood having, in his lease to the plaintiffs in this cause, covenanted to them for peaceable enjoyment, was substantially interested in the issue of this cause. 8. On or about the 21st of March last, I received a letter from Mr. H. Robinson, dated the 20th of March, to the purport stated in the affidavit of the said H. Robinson, sworn in this cause on, &c., and I replied

thereto, by *letter dated the 22d of March last, to the effect stated [*72 in the same affidavit; and I also received another letter from the said H. Robinson, dated the 24th of March, as stated in the same affidavit, to which last letter I made no reply, because I did not consider the said H. Robinson to be then the attorney for the said Andrew Mason in this cause, the said Andrew Mason never having given me any notice in writing under his hand that he had changed or intended to change his attorney Mr. Paget for Mr. Robinson. 9. The Nisi Prius rule made at the assizes pursuant to the arrangement aforesaid required the sum of 100*l.* to be paid by Mr. Greenwood within a month to Andrew Mason or his attorney; and on the 16th of April instant, the time having nearly expired, and the said Andrew Mason not having changed his attorney on the record, I, as Mr. Greenwood's attorney, caused the sum of 100*l.* to be tendered to the said Mr. Paget as the attorney of the said Andrew Mason, in compliance with the said rule; and the said Mr. Paget accepted and received the same as the attorney of the said Andrew Mason.

Mr. Paget's affidavit was as follows:—"1. I was the attorney for John Mason, brother to the above-named defendant, and instructed by him to commence an action at law against one John Greenwood for diverting a certain stream of water from running in a covered drain from a close of land marked C. on the plan on the deed of conveyance of such close of land on the sale thereof by the said John Mason to the said John Greenwood, in which conveyance I was informed by the said John Mason that the said John Greenwood had covenanted to permit and suffer the water from such close so sold to the said John Greenwood to flow in the covered drain to a certain other close of the said John Mason, as also shown on the plan on the said deed of conveyance: and I commenced such action, *which came on for trial at the last assizes for the [*73 county of York on Saturday the 13th of March; and, on the production of the conveyance deed by the said John Greenwood, it was found that the same had not been executed by him; and the judge ordered the jury to be discharged, and gave the plaintiff leave to amend the declaration, and the said John Greenwood his pleas; and the cause was to come on for trial at a certain time as will be hereafter explained. 2. I was also attorney for the above-named defendant, and also attorney for his brother Richard Mason and his nephew Jonathan Mason, against whom actions had been commenced by the above-named plaintiffs for damage and injury done by the above-named defendant and his brother Richard and his nephew Jonathan to certain reservoirs on Embsay Moor, which reservoirs had been there for forty years. Issue was joined in all the three last-mentioned actions, but notice of trial was given only in the action commenced against the above-named defendant Andrew Mason, and which cause was entered as a special jury cause (at the instance of the plaintiffs) for the last assizes for the county of York; and, at the time that leave was given for the amendment of the pleadings in the action *Mason v. Greenwood*, it was arranged that the trial thereof (which was a common jury cause) should take place immediately before the special jury action between the said plaintiffs and the defendant Andrew Mason. 8. The counsel for the above-named John Mason and Andrew Mason, in the before-named actions, were, Mr. A. and Mr. C. 4. The pleadings in the action of *Mason v. Greenwood* were

amended; but I was advised by counsel, that, inasmuch as the deed of conveyance had not been executed, and on account of the peculiar wording of the covenant in such deed, there would be a verdict against the *74] plaintiff: and, on a consultation in the action commenced *by the above-named plaintiff against the above-named defendant, his counsel were of opinion that the case was beset with so many difficulties that there was great fear that a verdict would pass against the defendant in that action; and they strongly recommended a compromise. This information I duly conveyed to the said John Mason and Andrew Mason.

4. The cause of *Mason v. Greenwood* again came on for trial on the 17th of March, when the plaintiff's counsel again recommended a settlement of all the actions, and spoke to the counsel on the part of the plaintiffs upon the subject; and Mr. Greenwood then proposed to give 50*l.*, and each party pay their own costs in all the actions. I went out of court to see the defendant and his brothers, who refused to take the 50*l.*, but would take 100*l.* and costs. I went again into court, and informed the counsel for the said John Mason and Andrew Mason. Mr. Greenwood by his counsel then proposed to pay 100*l.*, without any costs, and a paper was prepared to this effect by the counsel on both sides, and I was sent out of court again to see the defendant and his brothers on the terms of the said settlement; but they refused to accept the 100*l.* without the costs. I returned into court and informed Mr. A., who said he would see the parties himself, and he went out of court for that purpose, and I soon afterwards followed him, and found counsel Mr. A., and all the parties together, and heard what passed between them. After I went out of court, Mr. A. told the parties, that, in the action of *Mason v. Greenwood*, there was sure to be a verdict against the plaintiffs, and he would have costs to pay to the defendant; and he was not sure of a verdict in the special jury cause; and, if he could get 100*l.* without the Masons having anything to pay the above-named plaintiffs or Mr. Greenwood, he considered that would be a good settlement. They then said *75] they would accept *the 100*l.*, but would have the costs of the defendant's defence at York, at the assizes held in March, 1857, when he had been prosecuted for breaking down the banks of the reservoirs of the plaintiffs' mill. Mr. A. then said to them he very much doubted whether Mr. Greenwood would consent to this, but he would do his best for them. Mr. A. then left me and the parties together. I then went into court, when I found that counsel had arranged the case of *Mason v. Greenwood*, upon the terms that a juror should be withdrawn, that Mr. Greenwood should execute the deed on its terms securing the plaintiff in that action the use of the water to his close of land, each party paying their own costs, and Mr. Greenwood also paying to John Mason the sum of 8*l.* to make a diversion of the drain so as to allow all parties interested in the stream to have the use of the water; and that in the above-mentioned action a verdict was to be given for the plaintiff for 1*s.* damages, the injunction to be granted as prayed for, and that all other proceedings should be arranged as mentioned in the order of *Nisi Prius*. 5. The defendant Andrew Mason, and his brothers, John Mason, Richard Mason, and William Mason, and his nephew Jonathan Mason, were all in court at the time the arrangement was made; and I mentioned to William Mason, the brother of the defendant, on leaving the court, the particulars of the settlement of the said actions.

I left York by the second train the following morning; and at the York railway station John Mason came to me as the train was about to start, and requested me to return and have the cases tried; when I informed him that the causes had been settled, and, if they were not satisfied, they might see Mr. A., who would tell them all about it. 6. On the 22d of March, the defendant and his brother John Mason called at my office at Skipton, and said he was not *satisfied with the arrangement come to at York as to the settlement of this action, and said [*76 that he had seen Mr. A. at York, who informed him that I had settled the actions: and I then asked the defendant,—‘Did you see counsel yourself?’ and the defendant replied, ‘No: but my brother William saw him.’ I then said,—‘Send for your brother William.’ 7. William Mason, the brother of the defendant, was then immediately afterwards brought to my office by the defendant; when I asked him if he had seen Mr. A. at York; and William Mason then said he had seen him, and informed him that his brothers were not satisfied with the arrangements made; and the said William Mason then said that Mr. A. informed him (W. Mason) that the settlement which had been come to was the best that could be made for them. 8. The defendant Andrew Mason then said he would be satisfied with the payment of the 100*l.*, but he must have his costs, or he would upset the arrangement. 9. I did not then say that counsel had settled the said actions without the consent of either the said defendant or myself; for, on the settlement of the action against the defendant Andrew Mason, and after the counsel for the plaintiff and defendant had signed a memorandum of the terms of such settlement, I and Mr. Brown, the attorney for the plaintiffs, each signed the same memorandum, and it was then handed to Mr. Bell, the associate. 10. On the 15th of April instant, not having heard anything further from Mr. Robinson, the present attorney for the defendant, and as the time for paying the 100*l.* would expire the following day, I made arrangements with Mr. Brown, the attorney for the plaintiffs and the said John Greenwood, to receive the same; and I then wrote by post to Mr. Robinson a letter, as follows:—‘Dear Sir,—Masons’ actions. As these parties have not proceeded to change their attorney, and [*77 *pay my bill of costs, I have arranged to receive the 100*l.*, as agreed upon by the counsel at York. The money will be paid tomorrow; and the parties may then take such steps as they think proper. I intend now to carry out the terms of the order of *Nisi Prius*.’ 11. After the said letter was posted, I was served with a notice that a summons would be served on me the following day for changing the attorney in this action. 12. On the 16th of April instant, I received from Mr. Brown, the attorney for the plaintiffs and John Greenwood, the sum of 100*l.*, pursuant to the arrangement made at York, and was served with a summons the same day to change the attorney. 13. I am satisfied that the arrangement made at York was greatly to the benefit and advantage of the said John Mason, Andrew Mason, and their brother Richard Mason and their nephew Jonathan Mason, because, if the case of *Mason v. Greenwood* had been tried, and a verdict had passed for the defendant, or the plaintiff had been nonsuited,—which I was strongly advised would be the result of that action,—the said John Mason would not only have had to pay the said John Greenwood’s costs, but the lands of the plaintiff and his said brothers would have been greatly injured

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and deteriorated in value on account of the loss of the said stream of water thereto, which by the arrangement the said parties secured; and in the action of the said Andrew Mason there was a probability of a verdict passing against him: and, if such had been the case, from the defendant's statement to me I am of opinion that the jury would have given the plaintiffs substantial damages for the injuries they had received from the defendant."

It is evident from the affidavits that the whole matter was so left to the discretion of the counsel and attorney as to justify them in doing as they did. The party who now complains of the arrangement was *78] present, and expressed no disapprobation or dissent. It is not now suggested that the compromise was other than that which he himself agreed to, except as to the costs of the York prosecution, which had nothing to do with the matter in hand: and it would be manifestly contrary to justice and good faith to permit that arrangement to be departed from. The cases bearing upon the power and authority of counsel to effect compromises on behalf of their clients have recently undergone a great deal of discussion in *Swinfen v. Swinfen*, 18 C. B. 485 (E. C. L. R. vol. 86), 1 C. B. (N. S.) 364 (E. C. L. R. vol. 87), in this court, and afterwards before the Master of the Rolls (24 Beavan 549), and, on appeal, before the Lords Justices (27 Law J., Ch. 491), but with no very definite result. In *Thomas v. Hewes*, 2 C. & M. 519,† the Court of Exchequer refused to enter into the question, Bayley, B., suggesting that they did not consider themselves at liberty to set aside an order of *Nisi Prius* deliberately entered into by counsel. Here, the court is asked to set aside an agreement made between the counsel and attorneys on both sides, the clients being present, knowing what was passing, and making no objection. [WILLES, J.—We only deal with the rule of court, not with the agreement: *Wade v. Simeon*, 1 C. B. 610 (E. C. L. R. vol. 50).] In *Wade v. Simeon* there were special equitable grounds for the interference of the court to rescind the rule and vary the agreement. There are none here. [BYLES, J.—Suppose an attorney brings or defends an action without authority.] Where an attorney brings an action, professing to have authority to do so, though he has not, the court nevertheless will not stay the proceedings. [WILLES, J., referred to *Robson v. Eaton*, 1 T. R. 62. If a defendant has not been served with process, he is not prejudiced by an attorney's appearance for him: but if he has been served, it is otherwise.] In *Filmer v. Del-* *79] *ber*, 3 Taunt. 486, where a motion was made to set aside an order of *Nisi Prius* by which the cause had been referred to a barrister, on an affidavit by the defendant, stating that she had expressly desired her attorney not to consent to any rule of reference, Sir James Mansfield said: "Here is an express agreement to refer, properly entered into by counsel and attorney. It is now said that they had no authority to enter into that agreement: if so, the defendant's remedy is by action against her attorney. There would be no end to these applications if the court were to interfere: such interference would lead to collusion: when the party did not like the prospects of the reference, he would say that he had never given his attorney authority to refer." [CROWDER, J.—*Filmer v. Delber* is recognised in *Flaviell v. The Eastern Counties Railway Company*, 2 Exch. 344.† *Mole v. Smith*, 1 Jac. & W. 673, *Furnival v. Bogle*, 4 Russ. 142, and *In re Hobler*, 8 Beavan 101, also

show with what tenacity the courts adhere to arrangements made by counsel assuming to act on behalf of their clients.

Shee, Serjt., and *Mellish*, in support of the rule.—The substantial rights of the litigant parties are concluded by the arrangement here made. In this respect the present case differs from all those referred to. No reasonable inference can be drawn from the affidavits that either counsel or attorney had any express authority to do as they assumed to do: and no implied authority arises from their retainer or employment. The Master of the Rolls (Sir J. Romilly), who enters very fully into the matter, and goes even further than Crowder, J., did, in his very elaborate judgment in *Swinfen v. Swinfen*, 1 C. B. N. S. 364 (E. C. L. R. vol. 87,) expressly puts it upon the ordinary ground of agency. "The case," he says (24 Beavan 557), "is rested, first, upon this question of principle—whether an attorney or solicitor employed by a client *is at liberty to compromise the subject-matter of the suit, without [*80 the express authority of the client; and, secondly, the case is put upon the practice which the court adopts in such cases. I do not understand how, upon the principles by which the relation of principal and agent is governed, the argument can be supported. An agent has full authority to do everything that is within the scope of his authority expressed or implied. What is the authority which is vested in an attorney in these cases? He is employed to conduct a suit for a client; but I apprehend it to be perfectly clear that a compromise does not come within the term 'conduct of a suit,' and that a compromise is not within the meaning of the words 'management of a cause.' Upon what principle, then, can it be said that an attorney has an *implied* authority to compromise the subject-matter of a suit which he is employed to conduct? How far does it reach? Does such implied authority extend so far as to enable him to sell the subject-matter of the suit? Yet, in point of fact, a compromise is nothing more than a sale between the parties upon certain terms. Would it have been possible for Mr. Simpson, Mrs. Swinfen's attorney, to have sold his client's rights in the suit to a mere stranger for an annuity of 1000*l.* a year? It is obvious that this would not lie within the scope of his authority, if the purchaser were a stranger. Then, can it be said that it is within the scope of his authority, if he sold to the defendant in the suit? It appears to me, that, upon ordinary first principles, it cannot be so treated. I should no more consider the attorney I employ to conduct a suit authorized to dispose of the property sought to be recovered or defended, than I should expect that a person employed to take horses to a particular place to feed, or to break them in, would have an authority to sell or exchange them; or that a coachman employed *to drive a carriage would [*81 have authority to exchange it. Unless there be some rule applicable to attorneys different from that which prevails in other cases of principal and agent, it appears to me to be impossible to say that an attorney has, without the direct authority of his client, an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause, which is the matter that he is employed to do." And, after referring to *Elworthy v. Bird*, 2 Sim. & Stu. 372, *Tamlyn* 38, *Thomas v. Hewes*, 2 C. & M. 519,† *Furnival v. Bogle*, 4 Russ. 142, and *In re Hobler*, 8 Beavan 101, and to the cases of infants and married women, his Honor adds: "I myself have no doubt whatever, both on

principle and authority, that the employment of an attorney does not entitle him to sell the subject-matter of the suit either to a stranger or to the opposing party, without an authority for that purpose; and that, so far from its being productive of injurious consequences that he should not possess that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice. For myself, I should in that case be indisposed to allow any case of importance to be taken before me by consent, without being satisfied by evidence that the client himself had been communicated with on the subject. Since I have been upon the Bench, I have always assumed that the client has been communicated with, and that what is proposed is done with his sanction and knowledge. My opinion is, that, unless this were so, the functions of this court in matters of consent would be paralyzed. It would be too great an abuse of authority for an attorney to say that he has a right to dispose of the property of his client in a particular way, when, if he had communicated to him all the facts, the result would have been different, and yet that *82] the other side are at liberty to say that they are entitled to insist on such an agreement, and that the party is bound by it." That opinion is confirmed by the decision of the Lords Justices on appeal. Formerly it seems to have been thought that there was something sacred in arrangements made at *Nisi Prius*. [WILLES, J.—I must confess I still entertain that superstition.] In no case has a compromise made without the client's consent been enforced in a court of law: the courts have always studiously avoided a direct decision. It is important that the principles laid down in the judgment of Crowder, J., in this court, and by the Master of the Rolls and the Lords Justices, in *Swinfen v. Swinfen*, should be rigidly acted upon. *Bodington v. Harris*, 1 Bing. 187 (E. C. L. R. vol. 8), and *Biddle v. Dowse*, 6 B. & C. 255 (E. C. L. R. vol. 13), 9 D. & R. 404 (E. C. L. R. vol. 22), were also referred to.

Cur. adv. vult.

WILLES, J.—This case was argued in the course of the last Easter Term, before my Brothers Crowder and Byles and myself. In the unavoidable absence of my Brother Crowder, I proceed to deliver his judgment:—

This was an application to set aside an order of *Nisi Prius*, and all proceedings thereon, upon the ground that the cause was compromised without the consent or authority of the defendant.

Looking at the affidavits on both sides, there is no doubt that the arrangement upon which the order of *Nisi Prius* was drawn up, was entered into between the counsel and attorneys while the defendant was actually present in court, and expressed no dissent therefrom. It is true that he and his brother have sworn, that, although present, they did not understand what was going on; and, when a juror was with- *83] drawn, according to the terms of the arrangement, they thought the cause was only postponed. But we think it would be extremely dangerous for the court to act upon such statements,—the truth of which it would be almost impossible to ascertain.(a)

(a) In *Swinfen v. Swinfen*, 24 Beavan 559, the Master of the Rolls says: "Upon the question of acquiescence, I go this length,—that, if a client be present in court, and stand by and see his solicitor enter into terms of an agreement, and makes no objection whatever to it, he is not at liberty afterwards to repudiate it."

There had been a conference between the defendant and his counsel and attorney just before, outside the court, as to terms of compromise which had been proposed by the plaintiff, and rejected by the defendant. The last words, however, uttered by the counsel on leaving his client to return into court, as sworn by the attorney, were, that "he would do his best for him;" to which no dissent was expressed. I have no doubt that the learned counsel did the best he could in the arrangement which was made, and which we are not justified, on these affidavits, in disturbing.

As no blame whatever attaches to the plaintiff, or his attorney or counsel, I think the rule must be discharged with costs.

For my Brother Byles and myself, I have to add that we also are prepared to give judgment for discharging the rule with costs,—upon the ground that according to the opinions expressed by the majority of the court in *Swinfen v. Swinfen*, 18 C. B. 485 (E. C. L. R. vol. 86), and 1 C. B. (N. S.) 364 (E. C. L. R. vol. 87), the authority of counsel to make the compromise ought not to be inquired into in this proceeding between the parties.

Rule discharged, with costs.

According to the American authorities, an attorney employed in the usual way to conduct a suit has, in general, no authority to enter into a compromise, without the sanction of his client, express or implied: *Holker v. Parker*, 7 Cranch 436; *Huston v. Mitchell*, 14 Serg. & R. 307; *Stackhouse v. O'Hara*, 14 Penna. St. 88; *Dodds v. Dodds*, 9 Id. 315; *Stukely v. Robinson*, 34 Id. 316; *Abbe v. Rood*, 6 McLean 106; *Derwent v. Loomer*, 21 Conn. 245; *Davidson v. Rozier*, 23 Missouri 287. Yet the client may, by his acquiescence, with a knowledge of the facts, for a considerable period of time, render the compromise binding on himself, as any mere excess of authority may be thus ratified: *Abbe v. Rood*, 6 McLean 106; *Filby v. Miller*, 25 Penn. St. 264; *Mayer v. Foulkrod*, 4 Wash. C. C. 511. In *Holker v. Parker*, 7 Cranch 452, indeed, Chief Justice Marshall went so far as to say that "although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed at by all, and to create an opinion that the judgment of the attorney had been

imposed on, or not fairly exercised in the case." But this, it is apprehended, must be taken as representing what would be the bias of the court under such circumstances, rather than as enunciating any principle of law. For a compromise effected under the most undoubted authority, could hardly stand, if the elements thus excluded were present.

The subject of the authority of counsel to compromise a case, has been much discussed recently in England. In a case of *Swinfen v. Swinfen*, which was an issue of *devisavit vel non*, out of the Court of Chancery, Sir Francis Thesiger, afterward Lord Chelmsford, of counsel for the plaintiff, acting under a supposed authority from his client, and in reference to what then appeared to be her interest, agreed to a compromise, which was made a rule of court. The plaintiff afterwards repudiated the act of her counsel, and refused to be bound by the compromise. Upon a rule for an attachment, the majority of the court in which the issue was tried, were of opinion that the compromise was binding, but in deference to the opinion of the dissenting judge, discharged the rule, and left the parties to their remedy in

Chancery: *Swinfen v. Swinfen*, 18 C. B., 485; 1 Com. B., N. S. 864. In the latter court, the Master of the Rolls, and the Court of Appeal, on a bill filed for the purpose, also refused to enforce the compromise under the circumstances: *Swinfen v. Swinfen*, 24 Beav. 549; 27 L. J. Ch. 35; 5 De Gex & Jones 381; 27 L. J. Ch. 491. In the lower court, Sir J. Romilly rested his decision chiefly on the ground that there was no authority in counsel to compromise, saying, "I have no doubt whatever, both upon principle and authority, that the employment of an attorney does not authorize him either to sell the subject-matter of the suit to a stranger, or to the opposing party, without an authority for that purpose; and that, so far from its being productive of injurious consequences, that he should not have that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice." The appellate judges expressed no direct opinion on this point, holding that the compromise was made under circumstances which made it inequitable to enforce it. A new trial was granted in the case, in which the plaintiff was ultimately successful. She then proceeded to bring an action against Lord Chelmsford, to recover the costs and expenses to which she had been subjected in the litigation arising out of the compromise. A verdict was taken in that action, subject to the opinion of the court; and the subject was then very fully and learnedly discussed before the Court of Exchequer, who eventually decided, that the action would not lie, on the ground that counsel are not liable for error in judgment as to questions of law or fact: *Swinfen v. Lord Chelmsford*, 2 Law Times Rep. N. S. 406. It was admitted, however, by the court, that

this compromise could not be considered as binding in itself. "We are of opinion," said Chief Baron Pollock, "that although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial, we think he has not, by virtue of his retainer in the suit, any power over matters which are collateral to it."

In a case, however, decided shortly before *Swinfen v. Lord Chelmsford* (*Fray v. Vowles*, 28 L. J. Q. B. 232), where it was held that an attorney was liable for agreeing to a stay of proceedings against the direct instructions of his client, Lord Campbell took occasion to say, "I think an attorney who has power to conduct a cause, has power to enter into a compromise, provided he does it reasonably skilfully, and *bonâ fide*, and if there had been no express directions to him from his client to the contrary." He further intimated a distinction between a barrister and an attorney, as to their relative authorities in the management of a cause, which indeed was much more fully developed in *Swinfen v. Chelmsford*, but which is of not much importance in this country.

It may, therefore, be fairly said that notwithstanding the elaborate discussion which the question has received latterly in England, it is yet unsettled, though the weight of authority there seems in favour of what has been stated to be the American doctrine. It may be that the latter will need considerable modification in its application to particular cases, according to the suggestions of good sense and convenience. But, on the whole, it is the most safe and just.

*REEVE v. PALMER. June 25. [*84

It is no answer for an attorney, when sued in detinue for a deed which has been intrusted to him by a client, to say simply that he has lost it.

DETINUE for title-deeds, with a count for money received. To the first count the defendant pleaded, amongst other pleas, non detinet, and that the deeds were not the plaintiff's; and to the second never indebted and a set-off.

The cause was tried before Cockburn, C. J., at the last Spring Assizes at Cambridge. The facts were as follows:—The defendant was an attorney at Cambridge. The deeds in respect of which the action was brought had been left in the defendant's custody as attorney for the plaintiff. At the trial, there was only one deed in contest between the parties, the rest having been delivered up to the plaintiff after the commencement of the action. There was no evidence as to what had become of the missing deed, or how it was lost, except that the defendant stated that he had not seen it since the date of its execution in 1853. When the demand was made in 1857, the defendant claimed a certain sum for costs, which the plaintiff paid under protest.

The jury returned a verdict for the plaintiff on the second count, with 85*l.* damages, and for the defendant upon the first count, the jury leaving it in doubt whether the loss of the deed occurred before or after the demand.

David Keane, for the plaintiff, in Easter Term last, obtained a rule calling upon the defendant to show cause why a verdict should not be entered for the plaintiff on the issues on the first count, for 15*l.* damages, pursuant to leave reserved to him at the trial, on the grounds,—first, that the defendant, as the immediate bailee of the deed, was answerable in detinue though *he had lost the deed,—secondly, that the plaintiff was entitled to the verdict on the finding of the jury, as there [*85 was no evidence to show that the loss was before the demand, and that the defendant ought to have shown that to entitle him to the verdict. He referred to the Year Books 12 E. 4, fo. 12, and 10 H. 7, fo. 7, pl. 7, and to the case of Jones v. Dowle, 9 M. & W. 19.†

Wells, Serjt., for the defendant, also obtained a rule nisi for a new trial, on the ground that the verdict was against evidence.

Wells, Serjt., and Couch, showed cause against the plaintiff's rule.—It may fairly be collected from the evidence that the deed was lost before the making of the demand. The question is, whether detinue will under the circumstances lie. It is submitted that it will not. In Southcote's Case, 4 Co. Rep. 83 b, it was resolved, that, "if A. accepts goods of B. to keep them as he would keep his own proper goods, there, if the goods are stolen, he shall not answer for them." In the note (A) to that case, it is said: "That a general bailment and a bailment to be safely kept is all one was denied to be law by the whole court, ex relat. m^ri Bunb., note 3d edit. 2 Ld. Raym. Coggs v. Bernard, 911: vide Jones on Bailments 41, 83, in Kettle v. Bromsall, Willes 121, Willes, C. J., in delivering the judgment of the court, observed, that, according to Southcote's Case, the case of Coggs v. Bernard and several other cases, if the goods were delivered to be kept safely, though the defendant had been robbed of them, detinue will lie against him; for, he must take his

remedy against the thief or the hundred, as he can. But, if the goods were delivered to the defendant to take care of them as his own proper goods, &c., if he be robbed of them, that is a good plea." An attorney is not bound to keep a client's deeds safer than his own goods. *86] [*Keane* *referred to *The North-Western Railway Company v. Sharp*, 10 Exch. 451,† where it was held that it is the duty of an attorney to keep his clients' papers in a reasonable manner. COCKBURN, C. J.—The question here is not whether the attorney is liable for the negligent loss of the deed; but whether detainee will lie.] In 1 Chitty on Pleading, 7th edit. 138, it is said that detainee does not lie against a bailee, if before demand he lose them by accident (Bro. *Detinue de Biens*, pl. 1, 33, 40); though, if he wrongfully deliver the goods to another he will continue liable:" Bro. *Detinue de Biens*, pl. 1, 33, 40, and pl. 2, 34. If the party has not the means of answering the demand, he is not liable in detainee. There is this important distinction between trover and detainee, that, where the plaintiff complains of the non-delivery of the thing on demand, he must show that the defendant had it in his power to comply with the demand. In 2 Williams on Executors, 5th edit., p. 1565, it is said, that, "although, at the common law, an action of trover upon a conversion of the testator dies with him, yet, if the goods, &c., taken away continue still in specie in the hands of the executor or administrator of the wrongdoer, replevin or detainee will lie against such executor or administrator to recover them back; or trover, laying the conversion to have been by the executor; or, in case they are sold, an action for money had and received to recover their value." The finding of the jury in that case would be that the executor had assets. It is upon that principle that the case of *Jones v. Dowle*, 9 M. & W. 19,† proceeds. Even in trover, to constitute a refusal to deliver up the article a conversion, the party must have it in his possession or under his control at the time of the demand: *Smith v. Young*; 1 Campb. 440; *Verrall v. Robinson*, 2 C. M. & R. 495.† In Fitzherbert's *Natura Brevium*, 138 A., it is said: "A writ of detainee lieth in case where a *87] man delivereth goods or chattels unto another *to keep and afterwards he *will not* deliver them back again; then he shall have an action of detainee of those goods and chattles." In *Gledstane v. Hewitt*, 1 C. & J. 565, 570,† Bayley, B., says: "The nature of the action of detainee is, that the detainer is the gist of the action. The plaintiff must make out that he was entitled to the delivery of the article, and that the defendant wrongfully detained it." In Viner's *Abridgment*, *Detinue* (D. 5.), pl. 54, it is laid down that it is a good plea in detainee, "that, after the delivery, the horse was sick of divers infirmities, as botts, glanders, &c., by which he died at K. before request made by the plaintiff to re-bail him,"—citing Brooke's *Abridgment*, *Detinue de Biens*, pl. 42, who cites 21 E. 4, fo. 55. "Contrà, if he had not said that it was before request; for, if it had been after request, this had been the folly of the defendant: note the diversity:" pl. 55. Ibid. In Comyns's *Digest*, *Detinue* (D), it is said that detainee "does not lie, if the goods never were detained by the fault of the plaintiff; as, if the defendant finds goods, and before demand loses them by accident:" *semb.* Bro. *Detinue de Biens*, pl. 1, 33, 40. Here, the deed was rightfully in the defendant's possession; and he can only be liable if he wrongfully detains it after demand. "No right of action," says Dr. Story, in his

Law of Bailments, § 107, "accrues in any case against the bailee, unless there has been some wrongful conversion or some loss by gross ignorance on his part, until after a demand made upon him, and a refusal by him to redeliver the deposit. A demand and refusal is ordinarily evidence of a conversion, unless the circumstances constitute a just excuse, or a justification of the refusal." A demand is necessary, and must be alleged: *Kettle v. Bromsall*, Willes 118. And *Clements v. Flight*, 16 M. & W. 42,† shows that the detention must be adverse. It is not denied that the defendant may be *chargeable by force of the bailment, as is said in 10 H. 7, fo. 7, pl. 7; but not in this form. [*88

D. Keane (with whom was *O'Malley*, Q. C.), in support of the rule.—The jury found that the deed was lost. Under the old law, the declaration must of necessity have disclosed how the deed or the chattel got into the hands of the defendant. Here, the defendant received the deed as attorney for the plaintiff: and the case of *The North-Western Railway Company v. Sharp*, 10 Exch. 341,† shows the nature of the attorney's duty with respect to a client's papers,—it shows that his duty in respect of them is more extensive than that of an ordinary bailee; he is bound not only to keep them *safely*, but to keep them *reasonably well arranged*; and so the distinction taken in *Kettle v. Bromsall*, Willes 118, is in the plaintiff's favour. The Chief Justice there says, that, "according to *Southcote's Case*, 4 Co. Rep. 83, 84, the case of *Coggs v. Bernard*, 2 Ld. Raym. 909, Com. Rep. 133, Salk. 26, and several other cases, if the goods were delivered, to be kept safely, though the defendant had been robbed of them, detainee will lie against him; for, he must take his remedy against the thief or the hundred, as he can: but, if the goods were delivered to the defendant to take care of them as his own proper goods, &c., if he be robbed of them, that is a good plea." The liability for the detention arises from the fact of the defendant being bound to have the goods in his possession. Parke, B., in *Jones v. Dowle*, 9 M. & W. 19,† says,—“The evidence of the detention is, that the defendant does not return the chattel, when demanded.” A distinction is taken between the case of goods coming to the hands of the defendant by finding and by bailment. 27 H. 8, fo. 13, pl. 35. “Note, that Fitzherbert put a diversity where one comes to the possession of goods by bailment and *where by finding; for, where one comes to the possession by [*89 bailment, there he is chargeable by force of the bailment, and, if he bail them over, or they are taken out of his possession, yet he is chargeable to his bailor by force of the bailment; but it is otherwise where one comes to the goods by finding, for there he is only chargeable by reason of the possession, and if he be out of the possession lawfully before he who has the right has brought his action, he is not chargeable. Quod Shelley concessit.” The same distinction is found in *The Attorney-General v. Sir W. Capei*, M. 10 H. 7, fo. 7, pl. 14. A similar distinction is found in the Year Book of M. 12 E. 4, fo. 12, pl. 2, where Brian, C. J., says: “If I bail goods to a man to keep, there, into whose soever hands the goods may come, he is chargeable to me; so it is of a finding, &c.: but, if he to whom the goods are bailed bail the goods to another, this second bailee is chargeable only during the possession, &c., for, if he bail over, he is discharged, &c.: and so there is a diversity between a possession mediate and immediate.” [COCKBURN, C. J.—Your contention is, that it is the duty of an attorney to keep

the deeds of his client safely, and that the losing them, without more, necessarily implies a loss by carelessness; and that, if he desires to exonerate himself, he must show circumstances which amount to an excuse?] Precisely so. But, further, it is submitted, that, assuming a demand to be necessary before the loss, there was nothing to show here that the deed was lost before demand. [COCKBURN, C. J.—There was evidence that it had not been seen since its date. I think we must assume the loss to have taken place before the demand.] That question should have been left to the jury. All they found, was, that the deed was lost.

*90] *O'Malley* and *D. Keane* showed cause against the *defendant's rule, and *Wells*, Serjt., and *Couch*, were heard in support of it, when terms were agreed to.

COCKBURN, C. J.—I am of opinion that the plaintiff is entitled to have a verdict entered for him upon the first count, for nominal damages. It must be taken on the finding of the jury, coupled with the facts, that the deed for the recovery of which this action of detinue is brought, was a deed which was in the care and keeping of the defendant as attorney for and on behalf of his client, the plaintiff, and consequently that it was his duty to take ordinary care of it. The jury have found that he lost it: and I am of opinion that that must be taken to mean, in the absence of any explanation, that he lost it for want of that due and proper care, which it was his duty to apply to the keeping of it, unless it is qualified by circumstances showing that the loss of the deed could not have been prevented by the application of ordinary care. Being bound by his position in relation to his client to take ordinary care of a deed intrusted to him, he is clearly liable for the consequences resulting from the absence and want of that ordinary care. The question is, whether detinue will lie under the circumstances. It has been held from a very early time, that, where a chattel has been bailed to a person, it does not lie in his mouth to set up his own wrongful act in answer to an action of detinue, though the chattel has ceased to be in his possession at the time of the demand. The same principle applies where the chattel has ceased, by an act of omission on his part, to continue in his possession or custody. It cannot be permitted to the bailee, though he has done no act to dispossess himself of the article, to defend himself on the ground that he has kept it so carelessly and negligently that he no longer is in a condition to restore it to the bailor. *91] The same principle *which would estop him from setting up his wrongful act, would equally estop him from setting up his negligence. Therefore, I think the verdict should be entered for the plaintiff on the first count, though for nominal damages only, in accordance with the agreement come to by the parties on the discussion of the defendant's rule.

WILLIAMS, J. —I am of the same opinion. All the authorities, from the most ancient time, show that it is no answer to an action of detinue, when a demand is made for the redelivery of the chattel, to say that the defendant is unable to comply with the demand by reason of his own breach of duty. In the present case, the deed which is the subject of the demand in the first count was delivered to the defendant under circumstances which made it his duty to use ordinary care that it should be forthcoming when wanted. By the defendant's omission to perform

that duty, the deed was not forthcoming when demanded. It clearly is no answer for the defendant to say he has lost it. The rule must be absolute to enter the verdict for the plaintiff.

WILLES, J., concurring,

Plaintiff's rule absolute.

Defendant's rule discharged.

Feb. 7, 1859. The defendant appealed against this decision, and the case came on for argument in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Martin, B., Bramwell, B., Watson, B., and Hill, J. *Couch* was heard on behalf of the appellant, the defendant.

David Keane, for the respondent, was not called upon.

*POLLOCK, C. B.—For the reasons assigned in the judgment of the court below, I am of opinion that that judgment ought to be [*92 affirmed.

CROMPTON, J.—There are two answers to the objection urged on the part of the defendant, that, if the plaintiff intended to rely upon any breach of bailment, it ought to have been stated in the declaration. The first is, that, on an allegation of a general bailment, all the matter is now open to the plaintiff, if even it were not so before the Common Law Procedure Acts. The question is raised upon the facts, not upon the pleadings. The second answer is, that the objection is one merely of pleading; and that, if it had been taken at the trial, the judge would, if necessary, have amended the declaration. No good, however, would have resulted from taking such an objection there, for this was a clear case of bailment. According to the old law, where there was a bailment, the defendant could not set up that he had lost the chattel. There was abundant *prima facie* evidence that the defendant lost the deed by his own wrongful act.

BRAMWELL, B.—If there had been anything more important in dispute here than a mere question of costs, I should have liked to look into it a little more before deciding it. If the defendant has by his own default become dispossessed of or lost the deed, it may be that he may be considered as having wrongfully detained it. I am not prepared to say that there was sufficient evidence of negligence on the part of the defendant. All that appears, is, that the deed was deposited with him by his client, and that it is lost. I must confess I have not information enough about the matter to say whether the judgment of the court below was right or not.

*WATSON, B.—I am of opinion that the judgment of the Court of Common Pleas ought to be affirmed. Neither the bailment nor [*93 the finding is traversable in this form of action: *Gledstane v. Hewitt*, 1 C. & J. 565.† In *detinue* on a special bailment for safe custody, the authorities show that the bailee is liable if the deed is lost.

HILL, J.—It is conceded that *detinue* will lie against one who has parted with a deed which has been intrusted to him for safe custody. I am utterly at a loss to discover any difference between the case of an attorney who has lost a deed intrusted to him for safe custody, without any explanation as to the circumstances under which it was lost, and an attorney who has voluntarily parted with the deed to a third person. In *Comyns's Digest*, *Pleader* (2 X. 12), speaking of this form of action, where the deed has been lost, the Chief Baron says,—“If *detinue* be for

charters, the verdict must find some damages if the charters be lost,"—citing *Fisher v. —*, Saville 29. I think the judgment of the court below should be affirmed.

Judgment affirmed.

The gist of an action of detinue is doubtless the wrongful detainer at the date of the writ, and, therefore, if the chattel before suit actually brought, has been destroyed, or lost by casualty, or has ceased to exist, or has been by some lawful means removed from the possession of the defendant, without his fault or connivance, the action will not lie: *Lindsay v. Perry*, 1 Ala. 203; *Caldwell v. Fenwick*, 2 Dana 332; *Rucker v. Hamilton*, 3 Dana 36; see *Barksdale v. Appleby*, 23 Missouri 389. And, indeed, in some of the cases it has been held that the defendant is only liable if, at the time of the demand, he either had actual possession or a general controlling power over the chattel: *Charles v. Elliott*, 4 Dev. & Batt. 468;

followed in *Foster v. Ewbank*, 10 Ired. 424. But, in general, and according to the current of the American authorities, possession being once established in the defendant, it is not necessary that it should also be shown to exist at the date of the writ: *Burnly v. Lambert*, 1 Wash. Va. 305; *Pool v. Atkinson*, 1 Dana 110; *Rucker v. Hamilton*, 3 Id. 36; *Haley v. Rowan*, 5 Yerg. 301; *Kershaw v. Boyken*, 1 Brevard 301; *Lowry v. Houston*, 3 How. Miss. 394. The burthen of proof, in such cases, is on the defendant to show that the possession has ceased before suit brought, by accident, death, or by some means beyond his control: *Lynch v. Thomas*, 3 Leigh 694.

*94] *GOLDSMID v. HAMPTON. June 25.

The 5 & 6 W. 4, c. 41, s. 1,—reciting, that, by the 6 G. 4, c. 6, s. 125, it was enacted that "any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue and give that act and the special matter in evidence," and that "securities and instruments made void by virtue of the recited act are sometimes endorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given, and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice,"—repeals the recited act, and then proceeds to enact that "nevertheless every note, bill, or mortgage which if this act had not been passed would by virtue of the recited act have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration," and the said act "shall have the same force and effect, which it would have had if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such act had provided that any such note, bill, or mortgage should be deemed, and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."

The 202d section of the 12 & 13 Vict. c. 106, re-enacts in substantially the same terms the 125th section of the 6 G. 4, c. 16:—

Semble, that the same construction must be put upon the 202d section of the 12 & 13 Vict. c. 106, as the legislature had by the 5 & 6 W. 4, c. 41, put upon the 125th section of the 6 G. 4, c. 16.

But,—held, that that section does not apply to a bill accepted by the bankrupt in blank before, but not dated or drawn until after, the allowance of his certificate.

THIS was an action by the endorsee against the acceptor of a bill of

exchange. The declaration stated that B. C. Jones, on the 21st of December, 1857, by his bill of exchange, now over due, directed to the defendant, required the defendant to pay to the order of the said B. C. Jones 37*l.*, one month after date; and the defendant accepted the same; and the said B. C. Jones endorsed the same to the plaintiff; but the defendant did not pay the same: and the plaintiff claimed 40*l.*

Second plea,—that, before the drawing and accepting of the said bill of exchange, the defendant was indebted to divers persons in divers large sums of money, and, amongst others, was indebted to the said B. C. Jones in a certain sum of money, to wit, 37*l.*; that, afterwards, and whilst he was so indebted as aforesaid, and before the drawing and accepting of the said bill, he the defendant became and was a bankrupt within the true intent and meaning of the statutes *then in force [*95 concerning bankrupts, and was duly adjudicated a bankrupt, and that, before the time for the allowance of the defendant's certificate of conformity under the said statutes, and before the same had been granted to him, the bill of exchange in the declaration mentioned was, in pursuance of a certain unlawful agreement between the defendant and the said B. C. Jones, drawn and accepted as therein alleged, and the said bill of exchange was drawn and accepted and delivered to the said B. C. Jones, and received by him, for securing the payment of the said sum of money so due from the defendant to the said B. C. Jones, as aforesaid, and which said sum of money was so due from the said defendant at the time of the said bankruptcy, as a consideration, and for the purpose and with intent to persuade the said B. C. Jones to forbear opposing the allowance of the defendant's said certificate under the said statutes; and the said B. C. Jones had at all times aforesaid power and right to oppose the granting of the said certificate to the defendant; and the said B. C. Jones, in pursuance of the said agreement, and in consideration of having received the said bill as aforesaid, did not oppose the granting of the said certificate to the defendant. The plea then averred, that the plaintiff had notice of the premises before and at the time the said bill was endorsed to him as aforesaid, that the said bill of exchange was endorsed to the plaintiff after it was due and payable, and that there never was any value or consideration for the endorsement of the said bill of exchange to the plaintiff, who always held and now holds the said bill without any value or consideration for the payment of the same.

Third plea,—“and for a third plea the defendant, according to the form of the statute in such case made and provided [12 & 13 Vict. c. 106, ss. 202, 204], says that he did not promise as alleged.”

*Demurrer to the third plea, alleging for ground of demurrer, [*96 “that the sections upon which that plea is founded have no application to the case of an endorsee for value.” Joinder.

Second replication to the second and third pleas,—That the said bill was endorsed to the plaintiff *bonâ fide* and for full value before the said bill became due, and was dated, drawn, and so endorsed after the defendant had obtained his certificate of conformity under his said bankruptcy; the plaintiff, at the time of the alleged endorsement to him, having no knowledge or notice whatever that the defendant had become bankrupt, or of any fact or circumstance tending to render the said bill of exchange, or the alleged endorsement to himself, either void or voidable.

Demurrer, alleging for ground “that the 202d section of the Bank-

rupt Law Consolidation Act, 1849, declares that any such contract or security as is therein mentioned shall be void." Joinder.

Trevelyan, in support of the demurrer.—The declaration is by the endorsee against the acceptor of a bill of exchange. The second plea sets up a defence founded upon the 202d section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, which enacts "that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt's certificate, or to forbear to petition for the recall of the same, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue and give this act and the special matter in *97] evidence." The question is whether this makes the security absolutely void, so as to be incapable of being put in suit by a bona fide holder for value and without notice, or whether it merely prevents its being enforced as between the immediate parties. The effect of a repealed statute upon the construction of a subsequent statute in *pari materia*, is touched upon by Lord Justice Knight Bruce, in *Ex parte Copeland*, 2 De Gex, M'N. & G. 914, where, referring to the 5 G. 2, c. 30, he says: "Although it has been repealed, still, upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former act. Lord Mansfield, in the case of *The King v. Loxdale*, 1 Burr. 447, thus lays down the rule,—'Where there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.'" The 125th section of the 6 G. 4, c. 16, was in terms the same as the 202d section of the 12 & 13 Vict. c. 106; (a) but that was repealed by the 5 & 6 W. 4, c. 41. That act is intitled 'An act to amend the law relating to securities given for considerations arising out of gaming, usurious, and certain other illegal transactions.' It recites certain acts against gaming and usury, and the Irish bankrupt *98] act of 11 & 12 G. 3, c. 8, and then it recites, that, by the 6 G. 4, c. 16, s. 125, it was enacted "that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or secu-

(a) The 125th section of the 6 G. 4, c. 16, was, with some alteration, a re-enactment of the 11th section of the 5 G. 2, c. 30. The words of the last-mentioned section were, "that every bond, bill, note, contract, agreement, or other security whatsoever, to be made or given by any bankrupt, or by any other person, unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration, or to the intent to persuade him, her, or them to consent to or sign any such allowance or certificate, shall be wholly void and of no effect - and the moneys thereby secured or agreed to be paid shall not be recovered or recoverable; and the party sued on such bond, bill, note, contract, or agreement shall and may plead the general issue, and give this act and the special matter in evidence, anything herein contained, or any law, custom, or usage, to the contrary notwithstanding."

city might plead the general issue, and give that act and the special matter in evidence;" it then goes on to recite, that, "whereas securities and instruments made void by virtue of the several hereinbefore-recited acts are sometimes endorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given, and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice;" and, for remedy thereof, enacts "that so much of those acts as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but, nevertheless, every note, bill, or mortgage which if this act had not been passed would, by virtue of the said several lastly hereinbefore-mentioned *acts, [*99 or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several acts shall have the same force and effect which they would respectively have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such acts had respectively provided that every such note, bill, or mortgage should be deemed or taken to have been made, drawn, accepted, given, or executed for an illegal consideration." Now, when the recent act professed to consolidate all the laws relating to bankrupts, it must have intended to incorporate this provision therewith, and to avoid securities given under circumstances like these only to the extent to which they are avoided by the 5 & 6 W. 4, c. 41, s. 1. The authorities upon the subject of the avoidance of securities are summed up in the judgment of Rolfe, B., in *Bryan v. Child*, 5 Exch. 368,† 19 Law J., Exch. 264, where it was held that the 137th section of the 12 & 13 Vict. c. 106, which declares that a judge's order, made by consent, given by a trader defendant in any personal action, unless filed as thereby required, and the judgment and execution thereon, shall be "null and void to all intents and purposes whatever," does not avoid such order, &c., as against the trader himself, but only as against his assignees if he afterwards become bankrupt. That learned judge says: "I am prepared both on principle and on authority to confine the operation of the 137th section as protecting creditors only, and not as affecting the rights of parties claiming under persons who give such instruments. The statutes respecting ecclesiastical leases have been already referred to. Nothing can be stronger than the words there used, for, all leases not authorized by them are declared to be utterly void and of none effect, to all intents, constructions, and *purposes, any law, usage, and custom to the contrary anywise notwithstanding." Still the courts very early [*100 said that the leases were not void against the persons who made them, but merely against their successors, for whose benefit the statute was intended. The 3 G. 4, c. 39, on which this part of the 12 & 13 Vict. c. 106 is founded, gave rise to discussions of a like nature with the present. Its title is, 'for preventing frauds upon creditors by secret warrants of attorney to confess judgment,' and it begins with this preamble,— 'Whereas injustice is frequently done to creditors by secret warrants of attorney to confess judgment for securing the payment of money, whereby persons in a state of insolvency are enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants

of attorney have the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of their creditors:' it then enacts, that, 'if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and endorsements thereon, in case such warrant of attorney shall be given to confess judgment in His Majesty's Court of King's Bench, &c., or such a true copy, &c., in case given to confess judgment in any other court, shall within twenty-one days after the execution of such warrant of attorney be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments in the Court of King's Bench.' The 2d section enacts, that, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who gave it, under which he shall be duly found and declared bankrupt, unless the warrant of attorney

*101] 'shall have been filed within twenty-one days from the execution thereof, or judgment shall have been signed or execution issued on it within that period, such warrant of attorney and judgment and execution thereon shall be deemed 'fraudulent and void against the assignees under the commission,' and the assignees shall be entitled to recover back the moneys levied. The 3d section extends the enactment to cognovits. Then, the 4th enacts, that, 'if such warrant of attorney or cognovit shall be given, subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or cognovit actionem shall be written, before the time when the same, or a copy thereof, respectively, shall be filed, otherwise such warrant of attorney or cognovit actionem shall be *null and void to all intents and purposes*.' By the first, therefore, of these sections, the warrant of attorney or cognovit was void against the assignees, but, by the second, if the defeasance were not written pursuant to the statute, it was *void to all intents and purposes*. In *Morris v. Mellin*, 6 B. & C. 446 (E. C. L. R. vol. 13), 9 D. & R. 503 (E. C. L. R. vol. 22),—the first case after the statute,—the question was, whether the assignee of an insolvent could set aside as void a judgment founded on a warrant of attorney where the defeasance was not written on the same paper or parchment. A majority of the Court of Queen's Bench, consisting of Lord Tenterden, Bayley, J., and Littledale, J., held that the statute did not apply to the assignees of an insolvent, because the 4th section must be read in conjunction with the 2d, and construed only to mean assignees of a bankrupt. Mr. Justice Holroyd dissented, and, I own, with great appearance of justice, as there was a marked distinction in the language of the two sections, and it was somewhat strange to say that 'void to all intents' only meant as against assignees of bank-

*102] rupts, *when the limited language had been previously used: but this was the opinion of the majority of the court. Then followed the case of *Bennett v. Daniel*, 10 B. & C. 500 (E. C. L. R. vol. 21), 5 M. & R. 444, in which my Brother Parke, then sitting in the Queen's Bench, dissented from the view of the majority of that court, who held that a warrant of attorney without a proper defeasance could not be set aside as between the parties; but still he expressly said, that, if he had found in the statute that it was only meant for the protection of the assignees of bankrupts, he should have held differently, for, he concurred

in the principle upon which the cases as to ecclesiastical leases had been decided. The decision of the majority prevailed; and in *Davis v. Eyton*, 7 Bingh. 154 (E. C. L. R. vol. 20), 4 M. & P. 820, Tindal, C. J., considered the matter as settled. . . Although, therefore, you find in a statute the strong words 'null and void to all intents and purposes,' and even when more limited language is used in another section, yet, where the object of the statute is clearly limited, the general words may be cut down and narrowed." Even under the usury acts, the words of which were extremely strong, the courts evidently struggled to get out of them. In *Parr v. Eliason*, 1 East 92, a bill of exchange payable to A. or order, which was legal in its inception, was by him endorsed to B. for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to B.'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: and it was held, that the endorsement of A. to B. on an usurious account did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury, 12 Ann. st. 2, c. 16; and that B.'s assignees, being clothed with the rights of such innocent endorsee, were entitled to hold the bill against A., though, as between A. and B., the security *was void. Lord Kenyon said: "Where the bill [*103 itself in its original formation is given for an usurious consideration, the words of the statute of Anne are peremptory that the assurance shall be void: and the construction which has been put upon the statute has gone far enough, in saying that it shall be avoided even in the hands of an innocent endorsee without notice. But no case has gone the length now contended for, nor do the words of the statute require it. Here, the bill was fair and legal in its concoction, and therefore no advantage can be taken of what happened afterwards against bonâ fide holders. The defendants stand clothed with the rights of the party from whom they received the bill in payment, and must therefore be taken to be holders for a valuable consideration, without notice." 2. The plea and replication taken together do not show that the bill in question was a security given to induce a creditor to forbear to oppose the allowance of the certificate: it never became a security until after the certificate was obtained: it was *dated* and *drawn* after the allowance of the certificate. [WILLES, J.—The promise was before the allowance, the performance after.] The contract may be void; but the security is perfectly valid in the hands of a bonâ fide holder. In *Rex v. Hart*, 6 C. & P. 106 (E. C. L. R. vol. 25), it was held that a blank acceptance was neither a "bill of exchange" nor an "order for the payment of money" nor a "security for money." [CROWDER, J.—That is confirmed by a later case,—*Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549 (E. C. L. R. vol. 77).] 3. Another question arises, viz. whether the replication is a good answer to the third plea as well as to the second. If the court should think it no answer as to the third plea, it is submitted that it may be taken distributively: *Blagrove v. The Bristol Waterworks Company*, 1 Hurlst. & N. 369.† [WILLES, J.—A demurrer is not divisible: *you must ask leave to amend by [*104 striking out the words "and last."] The third plea is clearly a bad one. [WILLES, J.—Bad on special demurrer only; not a void plea.] *Prentice*, contra.—*Weeks v. Argent*, 16 M. & W. 817,† shows that the third plea is well pleaded. [*Trevelyan* abandoned the objection to VOL. V., C. B. (N. S.)—6

the third plea, and elected to amend his replication, by confining it to the second plea.] The second plea is a good answer to the action. A bill or note given in consideration of forbearance to oppose the discharge of an *insolvent*, though void in the hands of the party himself, was under the old insolvent acts held not to be so in the hands of an innocent holder for value: *Lucas v. Winton*, 2 Campb. 443; *Simpson v. Pogson*, 3 D. & R. 567 (E. C. L. R. vol. 16); *Rogers v. Kingston*, 2 Bingh. 441 (E. C. L. R. vol. 9), 10 J. B. Moore 97 (E. C. L. R. vol. 17); *Northam v. Latouche*, 4 C. & P. 140; *Murray v. Reeves*, 8 B. & C. 421 (E. C. L. R. vol. 15), 2 M. & R. 428 (E. C. L. R. vol. 17); *Horn v. Ion*, 4 B. & Ad. 78 (E. C. L. R. vol. 24), 1 N. & M. 627 (E. C. L. R. vol. 28); *Hills v. Mitson*, 8 Exch. 751.† But those cases have no application here. In *Shillington v. Theed*, 5 M. & P. 303, 7 Bingh. 405 (E. C. L. R. vol. 20), a security given for a bet upon a horse-race, which security was by the 16 Car. 2, c. 7, s. 3, declared to be “utterly void and of none effect,” was held not to be available in the hands of a bona fide holder for value and without notice. The like was held in *Bowyer v. Bampton*, 2 Stra. 1155, upon the earlier statute of 9 Ann. c. 14, s. 1, where the words were “void to all intents and purposes whatsoever.” [WILLIAMS, J.—In the gaming cases, the courts have held that the drawer or endorsee might be sued by an innocent holder, though the bill was void as against the acceptor,—upon the principle “that the words of a statute are not to be construed so as to extend beyond the mischief contemplated by the act, where such construction would be injurious to the interest of third persons:” **Edwards v. Dick*, 4 B. & Ald. 212 (E. C. L. R. vol. 6). All these cases were before the 5 & 6 W. 4, c. 41, which in plain and explicit terms declares what is the legal construction of words such as are used in the clause now in question. CROWDER, J.—It would seem that the framer of the act had overlooked the 5 & 6 W. 4, c. 41, and adopted the old objectionable language.] It may well have been done designedly. The legislature may have thought it right to go back to the law as it before stood. The construction contended for on the other side would deprive the bankrupt of the protection which the statute intended to give him. [CROWDER, J.—How do you get over the other point,—as to this instrument not being a “security” at the time of the allowance of the certificate?] If this wholesome provision of the statute could be evaded by such a trick as that, it might as well be repealed altogether. The agreement was before the allowance, and the document was handed over before, though it did not become a complete instrument until the drawer put his name to it. [WILLES, J.—It has been held, that, where an insolvent had given a blank acceptance, which was not filled up until after he had obtained his discharge, he was liable to be afterwards sued upon it.]

Trevelyan, in reply.—However the court may be disposed to deal with the construction of the 202d section, the second point has received no answer. This was clearly not a “security” given by the bankrupt to induce the creditor to forbear to oppose the allowance of his certificate. In *Lewis v. Chase*, 1 P. Wms. 620, Lord Chancellor Parker refused to relieve a bankrupt against a bond which he had given to a creditor in consideration of his withdrawing a petition against the allowance of the bankrupt’s certificate.(a)

(a) But see *Sumner v. Brady*, 1 H. Bl. 647.

*COCKBURN, C. J.—I am of opinion that our judgment must be for the plaintiff. If the bill in question had fallen within the terms of the 202d section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106,—which enacts “that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt’s certificate, or to forbear to petition for the recall of the same, *shall be void*, and the money thereby secured or agreed to be paid *shall not be recoverable*, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence,”—I should have felt bound (although I should have done so with great reluctance) to express a clear opinion that the plea was good and the action barred, because the legislature has by the statute 5 & 6 W. 4, c. 41, s. 1, expressly declared that the same words in the 125th section of the 6 G. 4, c. 16, made the security void in the hands of a bonâ fide holder or assignee for a valuable consideration, without notice of the original consideration for which the security was given; and that statute then goes on to mitigate that by repealing the former enactment, and by providing, that, “nevertheless, every note, bill, or mortgage which, if this act had not been passed, would, by virtue of the recited act, have been absolutely void, *shall be deemed and taken to have been made*, drawn, accepted, given, or executed, *for an illegal consideration*,” and that the recited act “shall have the same force and effect which it would have had, if, instead of enacting that every such note, bill, or mortgage should be absolutely void,” such act had “provided that every such note, bill, or mortgage should be deemed and taken *to have been made, drawn, accepted, given, or executed for an illegal consideration:” and then comes a proviso “that nothing herein contained shall prejudice or affect any note, bill, or mortgage which would have been good and valid if this act had not been passed.” The legislature, therefore, has distinctly declared what is the construction of the words in the new act, and what is the course to be pursued to give them any other effect; and, by the new act, instead of following up that view of the case, again enact that the security shall be void in the hands of a bonâ fide endorsee for value and without notice. It seems to me that we are bound to put upon the 202d section of the 12 & 13 Vict. c. 106, the same construction that the legislature by the 5 & 6 W. 4, c. 41, has declared that the same words in the 6 G. 4, c. 16, s. 125, were intended to bear.(a) It, however, becomes unnecessary to decide that on the present occasion, inasmuch as I do not think the case falls within the 202d section, because that section applies only to securities given *before* the allowance of the certificate, and the record shows that this was a security given *after* the allowance. If the mere *acceptance* constituted a security, the case would I think have fallen within

(a) Section 270 enacts “that, if any creditor of a bankrupt shall obtain any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose or for consenting to the allowance of the certificate of such bankrupt, or to forbear to petition for the recall of the same, every such creditor so offending shall forfeit and lose for every such offence the treble value or amount of such money, goods, chattels, or security so obtained (as the case may be).”

the 202d section of the statute: but the case referred to by my Brother Crowder in the course of the argument,—*Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549 (E. C. L. R. vol. 77,—is *108] *a distinct authority that it is not a “security” until a drawer’s name has been attached to it, for that a “security” means an instrument which is capable of being put in suit. At the time of the allowance of the bankrupt’s certificate in this case, the bill declared on was an inchoate instrument, and not a security. It is impossible, therefore, to say that it can fall within the 202d section. The replication raises the question whether the 204th section applies. But that section does not say that the contract shall be void: it only says “that no bankrupt, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made after the issuing of the fiat or filing of the petition for adjudication of bankruptcy; and, if any bankrupt be sued upon any such contract, promise, or agreement, he may plead the general issue, and give this act and the special matter in evidence.” If it had not been for the 202d section, I should have felt some difficulty in saying that the 204th section, the words of which are so general, did not make the bill unavailable in the hands of a bona fide holder for value. But, looking at the 202d section, and seeing that the legislature have in that section expressly said that the instrument shall be void, and having refrained from saying so in s. 204, they may very well have meant that it shall be void only as between the immediate parties.

CROWDER, J.—I also think the plaintiff is entitled to judgment. The language of the 202d section of the 12 & 13 Vict. c. 106, is a mere re-enactment of that of the 125th section of the 6 G. 4, c. 16. It is impossible to come to the conclusion that the words of the former *109] *mean something different from what those of the latter meant. The legislature have by the 5 & 6 W. 4, c. 41, shown what was the meaning of the word “void” in the 6 G. 4, c. 16, s. 125; and by that act they proposed to remedy the mischief which they conceived to arise from the provision in the former act; and they professed to mitigate the evil by enacting that the former enactment should have “the same force and effect which it would have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such act had provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration.” It is said that we are to take the 5 & 6 W. 4, c. 41, s. 1, and apply it to the 202d section of the 12 & 13 Vict. c. 106. I think it is impossible to do that. The legislature having declared that the meaning of the word “void” in the 6 G. 4, c. 16, s. 125, is void to all intents and purposes into whose hands soever it might come, I think the same word in the 12 & 13 Vict. c. 106, s. 202, must receive the same construction. For these reasons, I think the defendant would have been entitled to judgment if the bill in question had been brought within the terms of the last-mentioned section. I, however, agree with my Lord Chief Justice in thinking that it is not; for, the statute avoids the security where it is given “as a consideration or with intent to persuade the creditor to forbear opposing, or to consent

to the allowance of the bankrupt's certificate, or to forbear to petition for the recall of the same." Now, taking the replication and the plea together, it appears that this *acceptance* was given to the creditor *before* the allowance of the bankrupt's certificate, but that the *drawing* took place *after*. Unless, therefore, a blank acceptance can be said to be a "security," this transaction does not fall within the 202d section of *the 12 & 13 Vict. c. 106. The case of *Stoessiger v. The South Eastern Railway Company*, to which I referred, seems to be pre- [*110] cisely in point. There, C., being indebted to G. in more than 10*l.*, framed a document, directed to himself, ordering himself, three months after date "to pay to my order" the amount. The document had the stamp proper for a bill of exchange of that amount and length of time, and was in all respects like a bill of exchange, except that there was no drawer's name. C. wrote on it his acceptance, and caused it to be forwarded in a parcel directed to G., by a common carrier, in order that G. might add his name as drawer: and it was held that the document was not a bill, order, note, or security for payment of money. In construing the 202d section, we must look at the time when the document is handed over: and at that time it clearly was no security at all. As to the 204th section, I must own, that, but for the 202d, I should have had great difficulty in saying that this case did not fall within it. But, the legislature having clearly defined the meaning of the words used in the 202d section, and having adopted a different form of expression in the 204th section, I think we are bound to assume that they intended something different, and did not by the last-mentioned section mean to make the security void. There will, therefore, be judgment for the defendant on the demurrer to the third plea, and for the plaintiff on the demurrer to the second plea, the plaintiff amending his replication by confining it to the second plea.

WILLES, J., concurring,

Judgment accordingly.

*PIDDINGTON v. THE SOUTH EASTERN RAILWAY COMPANY. *June 21.* [*111]

A railway company by their act of incorporation were empowered to fix the sum to be charged by them in respect of the carriage of small parcels (not exceeding 100 lbs. each) "as to them should seem proper;" but that provision was not to extend to "articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which might be sent upon the railway at the same time."

By a subsequent act it was provided "that the charges by that act authorized to be made for the carriage of goods, &c., by the company, should be at all times charged equally to all persons, and after the same rate, in respect of all goods of a like description and conveyed on the same portion of the line; and that no reduction or advance should be made either directly or indirectly in favour of or against any particular company or person:—"

Held, that the company were restricted to a *reasonable* charge, and were not justified in making an increased charge in respect of the conveyance of "packed parcels," the jury having negatived that they incurred any additional risk or expense in the carriage thereof.

THIS was an action for money had and received. Plea, never indebted, upon which issue was joined.

By the particulars of demand it appeared that the action was brought to recover a sum of 95*l.* 13*s.* 3*d.* for overcharges alleged to have been

made by the defendants and paid to them by the plaintiff for the carriage of goods upon their railway, from the first of August to the 30th of November, 1857, inclusive.

The cause was tried before Williams, J., at the second sitting at Westminster in Easter Term last, when the following facts appeared in evidence:—The plaintiff had, since the year 1849, carried on the business of a carrier under the name of The Continental Parcels Agency, and was in the habit of sending a large number of parcels addressed to different persons, packed together in hampers, by the defendants' railway. Down to the year 1855, these parcels had been paid for separately, whether packed or not. In that year an agreement was entered into between the plaintiff and the company, under which they agreed to carry the plaintiff's parcels for 10s. per cwt. This agreement was to be determinable at a month's notice; and in January, 1857, it was accordingly put an end to by the plaintiff. In August, 1857, the company published a new scale of charges, by which it was amongst other things provided that parcels tied together or packed in wrappers or *112] hampers should be charged double rates. *The plaintiff paid these charges under protest, and now sought to recover back the amount of the excess.

For the defendants it was contended that the company had power, under the 133d section(a) of the 6 W. 4, c. lxxv., to charge what they pleased for small parcels.

For the plaintiff it was insisted that the charge was an illegal one, although the company professed to make it upon all persons alike; and reliance was placed upon the 17th section of the 2 Vict. c. xlii.(b)

The learned judge, reserving the point, left it to the jury to say *113] whether there was any additional risk or *expense incurred by the company from the packing of the parcels in the way stated. The jury found there was none: and a verdict was accordingly directed to be entered for the plaintiff for the sum claimed; leave being reserved to the defendants to move to enter the verdict for them, if the court should be of opinion that the double charge was justified by the 6 W. 4, c. lxxv. s. 133, and 2 Vict. c. xlii. s. 17, or either of them.

Hugh Hill, Q. C., on a subsequent day in the same term, obtained a rule nisi to enter a verdict for the defendants, on the ground, that, under the provisions of the 6 W. 4, c. lxxv., and 2 Vict. c. xlii., the

(a) Which enacts "that it shall be lawful for the said company from time to time to make such orders for fixing and by such orders to fix the sum to be charged by the said company in respect of small parcels (not exceeding 100 lbs. weight each) as to them shall seem proper: Provided always that the provision hereinbefore contained shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which may be sent upon the railway at the same time."

(b) Which enacts "that the said recited acts [6 W. 4, c. lxxv., and 7 W. 4 & 1 Vict. c. 93] or either of them authorized to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam-power or carriage to be supplied by the said company, shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said company or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the said railway."

defendants were entitled to charge for packed parcels double the sums charged for parcels not packed.

Lush, Q. C., and *J. Brown*, now showed cause.—At the trial, two classes of goods were in question,—packed parcels exceeding 100 lbs. weight each, and packed parcels not exceeding that weight; but the rule is limited to the latter. It is contended, on the part of the company, that the 133d section of the 6 W. 4, c. lxxv., empowers them to charge what they please for the carriage of small parcels, as they are called, however unreasonable the charge may be. Assuming that to be so,—though *Alderson*, B., in *Crouch v. The Great Northern Railway Company*, 11 Exch. 742, 752,† intimated a strong opinion that in the construction of a similar enactment in the 13 & 14 Vict. c. lxi. s. 14, it was to be read as if the word “reasonable” were inserted therein,—at all events the difficulty is got over by the 17th section of the 2 Vict. c. xlii., which compels the company to charge equally to all persons in respect of goods of a like description and conveyed or propelled by a like carriage or engine passing on the same portion of the line. “Description” there means *description for the purpose of [114 carriage: it cannot mean with reference to the contents of the parcel. In *Crouch v. The Great Northern Railway Company*, *Pollock*, C. B., says: “In disposing of the rule, it may be convenient to refer to the grounds on which it was granted. The first is, ‘that, under the 13 & 14 Vict. c. lxi. s. 14, the defendants are entitled to charge such charges as they thought fit for their parcels, their respective weight being under 500 lbs., provided they charged all parties equally; and the jury should have been so directed.’ Upon that point it is not necessary, in order to dispose of the rule, that we should give any judgment. The second ground is, ‘that, whether or no they *were* so entitled, they were entitled to charge extra for packed parcels; and the judge should have so told the jury.’ I am of opinion that the judge ought not to have so told the jury; and that, whether or no the defendants were entitled to charge extra for packed parcels, is, in my opinion, a question of fact, and not of law. It is not every difference in the articles carried which will warrant a difference in the rate of charge. No doubt, there are some goods which it may be more inconvenient or more expensive to carry, and as to which the carrier might well say that he would not carry them at the same price as other goods; but, if there be a difference, that is fit to be submitted to the jury. It seems to me, that, in principle, there is no difference between a packed parcel and an enclosure: but, supposing that there is, it ought to be submitted to the jury, as a matter of fact, whether the difference is such as to justify an increased rate of charge. I think that the learned judge would have been wrong in point of law, if he had told the jury that the defendants were entitled to charge extra for packed parcels.” [*BYLES*, J.—You will say that the additional charge for packed parcels is the same as if the company were to choose to *announce that they will charge [115 double for all parcels packed in blue paper.] Just so. [*WIL- LIAMS*, J.—If we sustain the opinion thrown out by *Alderson*, B., in *Crouch v. The Great Northern Railway Company*, 11 Exch. 752,† that the word “reasonable” must be imported into the clause, until Mr. *Petersdorff* convinces me to the contrary, I incline to think the double charge here is unreasonable. But, if that learned judge be wrong, then

the question arises, whether the 17th section of the 2 Vict. c. xlii. applies to prohibit this inequality of charge. Are these goods "of a like description?" They are, for carrying purposes, of a like description: the conveyance of them is not attended with any additional risk or expense to the company. [WILLES, J.—The word "reasonable" is found in s. 129 of the 6 W. 4, c. lxxv., with reference to goods other than small parcels.] The ordinary carriers, before the establishment of railways, never made any difference between packed parcels and others. [WILLIAMS, J.—That was proved.] The additional charge for packed parcels was held to be an infraction of a similar provision, in *Parker v. The Great Western Railway Company*, 11 C. B. 545 (E. C. L. R. vol. 73); and *Crouch v. The Great Northern Railway Company*, 9 Exch. 556,† shows that the company is not at liberty to make any distinction as to the charge for conveying small parcels between carriers and the rest of the public. The dictum of Alderson, B., in 11 Exch. 752,† is the only authority upon the subject of the reasonableness of the charge for small parcels: but, if there be any ambiguity in the language of their acts, the construction must be in favour of the public, and against the company,—*Parker v. The Great Western Railway Company*, 7 Scott N. R. 835, 870, 7 M. & G. 253, 288 (E. C. L. R. vol. 49); *Barrett v. The Stockton and Darlington Railway Company*, 8 Scott N. R. 641. *116] It has been suggested that the proviso in the 133d section of the 6 W. 4, c. lxxv., cannot apply to packed parcels at all. [WILLIAMS, J.—The true meaning of that is, that the article is to be weighed and charged in bulk, though put into separate bags or packages.](a)

Petersdorff, in support of the rule.—No case has yet decided that railway companies are restrained from charging what they please for the carriage of small parcels. In all the cases, it has been shown that there has been an inequality of charge as between the plaintiff and the rest of the public or some other individual. In the present case, it is not suggested that a higher rate is charged to the plaintiff than to others or to the general public: but the facts raise the abstract proposition, as to what is the power conferred upon this company by the 133d section of the 6 W. 4, c. lxxv. It appears, that, in 1855, there was an agreement between the plaintiff and the company, under which the former paid them 10s. per cwt. for packed parcels, which was something more than three times the amount charged for a parcel of the same weight. Before that time, the plaintiff had been in the habit of paying the usual parcels-rate. This agreement was a recognition by the plaintiff that there was some benefit to him from the system of packing parcels. There was nothing to show that any distinction was made between the plaintiff and other persons: and on the face of their announcement in the bills, it did not appear that any such difference was made. In the case of *Crouch v. The Great Northern Railway Company*, 11 Exch. 742,† there was evidence of undue preference. The 133d section of the 6 W. 4, c. lxxv., authorizes the company to make any charge they think proper for small parcels, and it enables them to draw a distinction *117] between different kinds of parcels. [WILLIAMS, J.—You need not trouble yourself as to the application of the 133d section, if there be no other impediment than the proviso. Do you contend that

(a) See *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77 (E. C. L. R. vol. 88).

the company are not restricted to a *reasonable* charge?] It is submitted that the equality clause (s. 137) has no application to small parcels at all, and that s. 133 in terms empowers the company to charge what they please: *Baxendale v. The Eastern Counties Railway Company*, 4 C. B. N. S. 63 (E. C. L. R. vol. 93). The 17th section of the 2 Vict. c. xlii. applies only to the tonnage-rate. [WILLIAMS, J.—It was not in terms put to the jury to say whether the charge was reasonable or not. But, why were they asked whether there were any circumstances to justify the increased charge for packed parcels? WILLES, J.—The real question is, whether the 133d section of the 6 W. 4, c. lxxv. gives *absolute* power to the company to charge what they please for small parcels.] The position of a railway company is not like that of a common carrier. The company may carry, but they are not obliged to do so: and they may select the kind of goods they will carry,—*Johnson v. The Midland Railway Company*, 4 Exch. 367,† 6 Railway Cases 61. “Packed parcels” is a term which is well known in the trade. The company may very well say they will not carry that description of package, except for an increased charge. All the cases cited on the other side are distinguishable from the present.

WILLIAMS, J.—I am of opinion that this rule should be discharged. It is unnecessary, in the view we take of this case, to decide whether or not the opinion thrown out by Alderson, B., in *Crouch v. The Great Northern Railway Company*, 11 Exch. 742,† that the 14th section of the 13 & 14 Vict. c. lxi. (the language of which is similar to that of the 133d section of the 6 W. 4, c. lxxv.) was to be read as if the word “reasonable” *had been contained therein, is correct. I do not [*118 mean to express any dissent from that opinion; but I do not think the present case calls for any expression of opinion upon the point. I may, however, observe that it seems to me to be a strong proposition to say that the 133d section of the 6 W. 4, c. lxxv., authorizes the company to charge for small parcels not exceeding 100 lbs. weight each whatever sum they please. But, as I have already said, it is unnecessary to consider what is the proper construction of that section, because I think the present case is governed by the 17th section of the 2 Vict. c. xlii.; which clearly, as it seems to me, applies so as to control the 133d section of the former act. By the 133d section of the 6 W. 4, c. lxxv., it appears that the company were authorized to make such charges in respect of small parcels (not exceeding 100 lbs. weight each) as to them should seem proper. Then comes the subsequent enactment, by which it is provided “that the charges by the recited acts or either of them authorized to be made for the carriage of any passengers, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam-power or carriage to be supplied by the said company, shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the said railway.” The question here is, whether

*119] the charges complained of are in violation of that *provision. I am of opinion that they are, because, though we cannot go into the details of what the parcels consisted of, I take it they may be looked at as goods; and they are charged for in this way,—If they are contained in separate parcels, they are charged at a certain rate,—and, if collected together in one package, the same goods are charged at double that rate. That clearly is a violation of the statute. I am therefore of opinion, that, there being nothing to justify the difference of charge which the company have made, it is an unauthorized charge, and the plaintiff is entitled to recover back the excess.

WILES, J.—I am of the same opinion. I must confess that it was some time before I could understand that such a question as this could be seriously argued: my impression was that it had been clearly settled by decided cases. The question is, whether the company can lawfully charge for parcels which are packed or tied together, double the sum which they would charge for the same parcels if carried separate. If the company are bound to make a reasonable charge, or to charge equally and at the same rate to all persons in respect of goods of a like description, they cannot so charge. The first point put by Mr. Cowling in his argument in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399,† and commented on by the court, was, whether, where the goods belonged to different persons, the carrier might not fairly make an additional charge for the increased risk, inasmuch as he might in case of loss or damage be subjected to several actions. Although that is a very ingenious argument, I must confess I never could properly appreciate it. It assumes that the defendants will violate their duty as carriers. On the other hand, suppose several

*120] actions were brought, the defendants would *recover their costs, which generally speaking, are to be assumed to be a complete compensation. Here, the jury found that there was not any increased risk. But, independently of that finding, I must own that I should have thought that the company's risk could not be at all increased by the circumstance of several parcels being put into one package. It may be inconvenient that the company should be subjected to several actions in respect of the loss of one single package. The observations of Lord Wensleydale upon that subject in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, 423,† are deserving of attention, as, indeed, was every word that fell from that very learned judge. But it seems to me to be unnecessary to consider that here. I think the jury were quite justified in concluding that the alleged increase of risk from the carriage of packed parcels was altogether illusory. That was a question of fact. The jury have decided it; and no exception has been taken to their finding upon the evidence which was before them. And I must say that I entirely concur in the conclusion arrived at. Then, are the company bound to make *reasonable* charges? That depends upon the proper construction of the 133d section of the 6 W. 4, c. lxxv. I think there is very great weight in the observation of Alderson, B., in *Crouch v. The Great Northern Railway Company*, 11 Exch. 742, 752:† but it is not necessary for us to express any opinion upon that point, because there is the 17th section of the 2 Vict. c. xlii., which enacts in plain terms that “the charges by the recited acts or either of them authorized to be made for the carriage of any passengers, goods,

&c., shall be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, &c., of a like description," &c. The circumstance of the goods being packed or *tied together does not make them cease to be goods of a like description. I think the company were [*121 wholly unjustified in doubling the charge in this way. It is clear upon the whole facts of the case that the increased charge is made for the purpose of preventing people who are likely to send packages of the description in question, viz. carriers, from entering into competition with the company in the conveyance of goods,—a thing which it has over and over again been decided that these companies cannot be permitted to do.

BYLES, J.—I am of the same opinion. I certainly laboured under the impression that the question of packed parcels had been settled, not only in this country, but also in America, where there are extensive companies formed for the express purpose of forwarding goods by railway from one end of the continent to the other. The 17th section of the 2 Vict. c. xlii., requires the company to charge alike to those who send single or those who send composite parcels. Here, the defendants charge double for certain packages, though the goods are of a like description, and the jury have found that there is no increased risk or expense incurred by them in the carriage of them. That seems to me to be an express violation of the 17th section. Rule discharged.

In *Sandford v. The Catawissa, &c., Railroad Co.*, 24 Penn. St. 378, the defendants, by their act of incorporation, were required to transport to the termination of their road, or to any other point thereon, in the order which they, their officers, &c., shall be requested to transport the same, all goods, &c., which should be deposited at the company's depots, &c., "so that equal and impartial justice shall be done to all owners of property, by the company, who shall pay or tender to the officers of the company the toll and freight due under this act, on the goods, &c., which they may wish transported." It was held that express companies had the same rights under the act as the owners of the packages which they conveyed would have, and, therefore, that a contract by the railroad company, giving to an express company an *exclusive* right of transportation in their passenger trains, as against other express companies, was illegal and void, as creating an improper preference. It was,

indeed, intimated that the decision would have been the same, even if there had been no express provision in the charter. "Wherever," said Chief Justice Lewis, "a charter is granted for the purpose of constructing a railroad, and the corporation is clothed with the power to take private property in order to carry out the object, it is an inference of law, from the subject-matter of the grant, that the road is for public accommodation. The right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages, it results from the nature of the right, that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men, and denied to others. The special stipulations inserted in charters for the purpose of securing these rights, are placed there in abundance of caution, and affirm nothing more than common right to equal justice which exists independently of such provisions."

***122] *BOTTOMLEY the Younger v. ROBERT NUTTALL. Nov. 29.**

One of the members of a foreign firm resident in this country, bought goods on account of the firm, for which he gave his own acceptances. Before the maturity of the bills, the acceptor became bankrupt, and the drawer (or those to whom he had endorsed them) proved for the amount against the acceptor's estate, and received dividends:—Held, that the vendor of the goods (to whom the bills had been returned) had done nothing to prejudice his right to have recourse against the other members of the firm for the unpaid balance.

The mere fact of the vendor's dealing with the resident partner, making out the invoices to him individually, and drawing upon him alone though aware that he was a member of a firm, and that the goods were to be shipped for the firm, makes no difference.

THIS was an action for goods sold and delivered, and for money found due on accounts stated.

The defendant pleaded,—first, never indebted,—secondly, for a further plea to so much of the declaration as related to money payable for goods sold and delivered by the plaintiff to the defendant, that the said goods were sold and delivered by the plaintiff to the defendant jointly with certain other persons who then carried on business in co-partnership with him the defendant, to wit, James Hargreaves Nuttall and Edward Henry Hawke Nash; and that the plaintiff made and drew certain bills of exchange, and directed the same to the said James Hargreaves Nuttall, and thereby respectively required the said James Hargreaves Nuttall to pay to his, the plaintiff's order, at times which had long since elapsed, several sums of money, amounting in the whole to a large sum, to wit, to the price of all the goods which were so sold as aforesaid: That the said James Hargreaves Nuttall accepted the said bills, and delivered the same to the plaintiff, who then took and received the same *for and on account and in payment of* the price of the said goods, and the said causes of action in respect thereof: That, afterwards, and before the commencement of this action, the plaintiff endorsed and delivered the said bills of exchange to certain persons, to wit, to persons to the defendant unknown, who thereupon became the holders thereof: That afterwards, and before the commencement of this suit, the said James Hargreaves Nuttall became and was duly declared and adjudged to be a bankrupt within the statutes in force concerning

***123] *bankrupts, and thereupon the said persons to whom the plaintiff** had so as aforesaid endorsed the said bills,—such persons being then the holders thereof respectively,—proved for the amount of the said bills against the estate of the said bankrupt, and received dividends out of the said estate in respect thereof.

Replication to the second plea, except so far as it related to the sum of 251*l.* 18*s.* 5*d.*, parcel of the claim to which the said second plea was pleaded,—that the amount of the said bills therein mentioned for which the holders thereof respectively proved against the estate of the said bankrupt as therein mentioned, was 1042*l.* 13*s.* 1*d.*, and that the dividends received by the holders of the said bills out of the said estate, in respect thereof, as in the second plea mentioned, amounted to the said excepted sum of 251*l.* 18*s.* 5*d.* and no more: And that, after the amount of the said bills had been so proved against the estate of the said bankrupt, and before the commencement of this suit, the said bills were returned to and taken up by the plaintiff as the endorser thereof, and

the plaintiff thereby then, and before and at the time of the commencement of this suit, became and was, and still is, the holder thereof for the unpaid value thereof, and entitled to the amount and value thereof, less the amount of dividends so paid as aforesaid; and the said bills at the time of the commencement of this suit were, and still are, in the hands of the plaintiff, unpaid and unsatisfied, except as aforesaid.

As to the excepted sum of 251*l.* 18*s.* 5*d.*, there was a nolle prosequi.

The defendant joined issue upon the plaintiff's replication to the second plea, and also demurred thereto, on the ground that "the second plea showed a *prima facie* satisfaction of the plaintiff's cause of action, and *that the replication afforded no answer to the plea." Joinder. (a) [*124

The cause came on to be tried at the Spring Assizes for the southern division of the county of Lancaster, in 1857, when a verdict was found for the plaintiff for 2000*l.* and costs, subject to the opinion of the court on the following case:—

The following is a copy of the particulars of the plaintiff's claim:—

	£	s.	d.
" 1854, October 4th To goods	209	6	1
" December 22d	3	11	4
1855, January 2d	412	9	6
" " 4th	235	18	0
" " 5th	184	19	6

The plaintiff at the time of the transactions in question, was, and he still is, a stuff-merchant, carrying on *business at Bradford, in the west riding of the county of York, under the firm of Moses Bottomley jun. & Co. The defendant is a merchant now residing near Manchester. [*125

Previously to the 1st of September, 1851, the defendant and one Henry Hargreaves carried on the business of commission agents and general merchants at Rio de Janeiro, under the name and firm of Hoyle, Hargreaves & Co.

On the said 1st of September, 1851, the said Henry Hargreaves being dead, a partnership was formed between the defendant and James Hargreaves Nuttall and Edward Henry Hawke Nash mentioned in the second plea, for carrying on the said business, which partnership continued under the style or firm of Hoyle, Hargreaves & Co., until the 23d of February, 1855, when it was dissolved.

(a) The argument of the demurrer was involved in the argument of the special case.

The plaintiff's points on the demurrer were,—“That the second plea is not a plea in satisfaction, unless the bills of exchange drawn on James Hargreaves Nuttall were duly honoured; that such plea is answered by the replication and nolle prosequi, which give the defendant credit for the amount obtained by the holders of the bills from James Hargreaves Nuttall's estate, and show that the bills were before the action returned to the plaintiff dishonoured and unpaid as to the residue.”

The defendant's points on the demurrer were,—“That the second plea shows that the cause of action declared on was satisfied, and that the replication affords no answer to the plea: and that it is not competent to the plaintiff to sue the defendant for the price of the goods, or any part of it, after taking James Hargreaves Nuttall's acceptances in payment for the goods, and after endorsing those acceptances to third parties, who have proved them against the estate of James Hargreaves Nuttall, and received dividends in respect thereof.”

The articles of the said partnership are dated on the said 1st of September, 1851, and were to be referred to as part of the case.

By those articles, in which James Hargreaves Nuttall is described as of Liverpool, in the county of Lancaster, merchant, the term of the partnership was to be six years from the date, and the partnership firm was to be Hoyle, Hargreaves & Co. The partners were to share profit and loss in certain named proportions. The defendant was to be allowed 700*l.* per annum in addition to interest on his capital, so long as he continued the resident partner in the Brazils, for his housekeeping and maintenance, in addition to the rent and taxes of the premises where the business was carried on; and James Hargreaves Nuttall was to be allowed 250*l.* per annum (afterwards increased to 300*l.* per annum) for his travelling and other expenses in England on account of the partnership: and, in case the defendant should return to England, and incur *126] *expenses on account of the partnership, he was to be allowed them in the same manner.

By the articles it was further provided, that Mr. Nash was to be allowed 300*l.* per annum, Mr. James Hargreaves Nuttall 700*l.* per annum, with interest on his capital, and the defendant, if he should leave the Brazils, 700*l.* per annum, with interest on his capital. All surplus profits were to accumulate. The partners were not to be engaged in any other business whatever, or to make any purchase of goods out of the usual course of business, or embark in any speculation or adventure on his own separate account; but that provision was not to interfere with the then business in which James Hargreaves Nuttall was then engaged distinct from the partnership.

At the date of the said articles, and until the year 1853, the defendant and Nash were the resident partners at Rio de Janeiro. In that year the defendant left Rio, and came to reside near Manchester, where he resided until on or about the 9th of March, 1855, when he quitted England, and went again to Rio de Janeiro, whence he returned and arrived in this country in the month of July, 1856.

At the date of the said articles, James Hargreaves Nuttall resided at Liverpool, where he had previously carried on the business of a merchant. He has continued to reside at Liverpool ever since; and, besides the business of the partnership, he has continued to carry on the said business of a merchant there on his own account until his bankruptcy, which occurred in March, 1855. James Hargreaves Nuttall, during the continuance of the partnership, transacted the business of the firm in this country. He from time to time sold coffee and other goods sent by the firm to this country for sale; and he procured consignments of goods *127] to be made to the firm, to be disposed of at Rio de Janeiro by the firm as the factors or agents of the consignors. He also purchased goods for the firm, which were sent out by him to Rio de Janeiro to the firm, and were there disposed of by the firm on account and for the benefit of the firm. After the defendant came to reside in England as above mentioned, he assisted the said James Hargreaves Nuttall with his advice, and was generally consulted by the said James Hargreaves Nuttall in respect of the consignments and purchases of goods.

In the commencement of September, 1854, Mr. Nash, the then resi-

dent partner of the firm at Rio de Janeiro, advised James Hargreaves Nuttall that worsted and cotton dresses were in good demand. On receipt of this information, James Hargreaves Nuttall consulted the defendant on the course to be pursued; and the defendant recommended the purchase of some cases of such dresses for the firm. In pursuance of such advice, James Hargreaves Nuttall, in October, 1854, purchased from the plaintiff, for 209*l.* 6*s.* 1*d.*, six cases, containing nine hundred worsted and cotton dresses, which, by the directions of James Hargreaves Nuttall, were forwarded by the plaintiff to Southampton, to wait the orders of the said James Hargreaves Nuttall. By the orders of the said James Hargreaves Nuttall, these goods were sent from Southampton by the first steamer to Rio de Janeiro, to the said firm of the defendant there; and the said dresses were at Rio de Janeiro sold at a profit by the firm on the account and for the benefit of the firm.

The price of these dresses, namely, 209*l.* 6*s.* 1*d.*, forms the first item in the particulars of demand.

Mr. Whittaker has since the month of May, 1854, been the plaintiff's agent in Liverpool. Mr. Atkinson, who is dead, was his assistant, and had a share of all the commissions earned for business done in connection *with the west riding of Yorkshire, and principally managed [*128 such business. The plaintiff was aware that his business in Liverpool was principally managed by Mr. Atkinson, but looked upon him merely as a clerk of Mr. Whittaker. The order for the dresses in October, 1854, was given by James Hargreaves Nuttall to Mr. Atkinson, and forwarded by him as Mr. Whittaker's assistant to the plaintiff. Mr. Atkinson was at that time aware of the existence of the firm of Hoyle, Hargreaves & Co., at Rio, and that the goods were purchased by James Hargreaves Nuttall for that firm. He was also aware of the fact that the firm consisted of James Hargreaves Nuttall, the defendant, and the said Edward Henry Hawke Nash.

Before and at the time of such order being given, the plaintiff himself knew that there was a firm carrying on business at Rio de Janeiro under the name of Hoyle, Hargreaves & Co.; and he knew that James Hargreaves Nuttall was a member of that firm; but, until the 7th of March, 1855, the plaintiff did not know, save as aforesaid, and as hereinafter mentioned, that the defendant was a member of the firm, or that he was resident in England, or that the said James Hargreaves Nuttall had any partner or partners in the said firm. Before and at the time when the said goods were ordered and supplied, in October, 1854, one Hanson assisted the plaintiff as his general manager in his business at Bradford; but he was neither consulted nor interfered about the above-mentioned goods. He was aware of the existence of the firm at Rio; but he did not know who were the partners in it until the month of December, 1854, when James Hargreaves Nuttall purchased some more goods from the plaintiff, as hereinafter mentioned.

The following is a copy of the invoice which was sent in by the plaintiff for the goods so as aforesaid supplied in October, 1854:—

*129] "Mr. J. H. Nuttall, Liverpool.
 "Bought of M. Bottomley Jun. & Co.

					£	s.	d.
109	150	6/4 Circassian robes	4/2½	31	11	3	
		10 cartoons	3/6	1	15	0	
		Tin and wood cases	19/6		19	6	
110	150	6/4 Circassian robes	4/2½	31	11	3	
		10 cartoons	3/6	1	15	0	
		Tin and wood cases	19/6		19	6	
111	150	6/4 Circassian robes	4/2½	31	11	3	
		10 cartoons	3/6	1	15	0	
		Tin and wood cases	19/6		19	6	
112	150	6/4 Circassian robes	4/2½	31	11	3	
		10 cartoons	3/6	1	15	0	
		Tin and wood cases	19/6		19	6	
113	150	6/4 Circassian robes	4/2½	31	11	3	
		10 cartoons	3/6	1	15	0	
		Tin and wood cases	19/6		19	6	
114	150	6/4 Circassian robes	4/2½	31	11	3	
		10 cartoons	3/6	1	15	0	
		Tin and wood cases	19/6		19	6	
Sample	15	6/4 Circassian robes	4/2½	3	3	1	
		Cartoon	3/6		3	6	
		Tin and wood cases			5	0	
				209	6	1	

"To W. & I. Bleaymire, Southampton, on account of J. H. Nuttall, Liverpool, to wait his instructions."

By the terms of the sale of the said dresses, the plaintiff was to draw on James Hargreaves Nuttall for the amount of the invoice, at three months; and accordingly on the 4th of December, 1854, the plaintiff drew on the said James Hargreaves Nuttall a bill for 209*l.* 6*s.* 1*d.*, being one of the bills mentioned in the second plea. This bill was accepted by James Hargreaves Nuttall, and was endorsed over by the plaintiff to Messrs. Bottomley & Son, of Halifax. Before this bill became due, James Hargreaves Nuttall became bankrupt: and, the said bill being dishonoured, the said endorsees proved the same against James Hargreaves

*130] Nuttall's estate, and received a dividend thereon, being part of the sum of 251*l.* 18*s.* 5*d.* mentioned and excepted in the introductory part of the replication to the second plea, and for which a nolle prosequi has been entered. The said bill afterwards, and before this action was commenced, was taken up by the plaintiff.

The other goods mentioned in the particulars of demand (except those supplied on the 22d of December, 1854, to the amount of 3*l.* 11*s.* 4*d.*) were purchased in December, 1854, and were delivered at the dates mentioned in the particulars. They were purchased and paid for and forwarded to Southampton in the same manner, and on the same terms, and under the same circumstances in all respects, as are hereinbefore mentioned, save and except that James Hargreaves Nuttall told Mr. Hanson, when the order was given, that they were for the Rio firm of Hoyle, Hargreaves & Co.; and he also told him the names of the partners in that firm. The plaintiff himself also knew that the goods ordered in December were for the Rio firm, and that the name of that firm was Hoyle, Hargreaves & Co.

[Copies of the invoices of these goods, which were in the same form as that above set forth, were inserted in the case.]

In respect of these goods, a bill for 833*l.* 7*s.* was, on the 4th of January, 1855, drawn by the plaintiff on James Hargreaves Nuttall, being the other of the bills mentioned in the second plea. This bill was accepted by James Hargreaves Nuttall, and was endorsed over by the plaintiff to the firm of T. Salt, Sons, & Co. Before this bill became due, James Hargreaves Nuttall became bankrupt; and, the bill being dishonoured, the endorsees proved the same against the estate of James Hargreaves Nuttall, and received a dividend thereon, being the residue of the said sum of 251*l.* 18*s.* 5*d.* mentioned and excepted in the introductory part of the *second plea, and for which a *nolle prosequi* has been entered. This bill also was returned to and taken up by the plain- [*131 tiff before this action.

The goods supplied on the 22d of December, 1854 (value 3*l.* 11*s.* 4*d.*), were fifteen robes sent to James Hargreaves Nuttall as samples, and kept by James Hargreaves Nuttall for his own use. On February 28, 1855, James Hargreaves Nuttall, being in insolvent circumstances, called a meeting of his creditors, which was held at Liverpool on the 7th of March following. This meeting was attended by the plaintiff. After the 28th of February, and before the meeting was held, the plaintiff sent Mr. Hanson to Liverpool to make inquiries; and, on his return, the plaintiff for the first time learned that the defendant and Mr. Nash were partners of James Hargreaves Nuttall, and members of the said firm of Hoyle, Hargreaves & Co. On or immediately after the same 9th of March, the defendant left this country, and went to Rio de Janeiro, whence he returned to England in July, 1856.

On the 23d of March, 1855, James Hargreaves Nuttall was adjudicated a bankrupt.

It was agreed that the court might make any amendments in the pleadings which to the court might seem fit; and the court was to draw such inferences or conclusions as a jury ought to have done.

The question for the opinion of the court was,—whether, upon the facts and pleadings, the plaintiff was entitled to recover in this action any and what sum: and the court was to direct how and in what manner the verdict was to be entered, and to dispose of the demurrer at the same time.

Unthank, for the plaintiff.(a)—The short facts are *these:— [*132 The plaintiff carried on business at Bradford in Yorkshire, having an agent named Whittaker at Liverpool. The defendant was a member of a firm at Rio de Janeiro, one member of which, viz. James Hargreaves Nuttall, resided at Liverpool. James Hargreaves Nuttall bought goods

(a) The points marked for argument on the part of the plaintiff, were,—

"1. That the purchases in question were made by James Hargreaves Nuttall for his firm, of which firm the defendant was a member:

"2. That, under the circumstances stated in the case, the plaintiff was entitled to debit the members of the firm with the price of the goods, when he became aware that they were the real principals:

"3. That he is not precluded from so doing by having in the first instance, and in ignorance of the facts, debited James Hargreaves Nuttall with the price of the goods:

"4. That the knowledge that the defendant was a member of the firm, possessed by Mr. Atkinson, the assistant of Mr. Whittaker, the plaintiff's Liverpool agent, through whom the orders were given, is not sufficient to preclude the plaintiff from debiting the defendant, especially as the case negatives the plaintiff's personal knowledge."

for the firm at Rio, and which were afterwards shipped thither to and sold by the firm, from the plaintiff's agent, Whittaker; and these goods were paid for by the acceptances of James Hargreaves Nuttall, and the invoices were made out in his name, the goods being deliverable to him. The agent at Liverpool at the time of the sale knew that James Hargreaves Nuttall was a member of the Rio firm; but the plaintiff himself was ignorant of that fact. Now, according to the cases of *Paterson v. Gandasequi*, 15 East 62, *Addison v. Gandassequi*, 4 Taunt. 574, and *Thomson v. Davenport*, 9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110, where goods are bought by an agent on account of an unknown and undisclosed principal, the seller, upon afterwards discovering the principal, may recover the price from him, although he may in the first *133] instance have given credit to the agent. **[WILLIAMS, J.—In those cases, the agent had no interest in the transaction except as agent. COCKBURN, C. J.—This differs from the ordinary case. Here, you treat the agent as principal to a certain extent, and obtain part payment from him as such. Can you afterwards rip up the transaction and say that quoad that part he was principal, but that as to the residue he was agent?]* If the acceptances given by James Hargreaves Nuttall had been returned wholly unpaid, the plaintiff might clearly have resorted to the Rio firm. *[BYLES, J.—The taking the bills from James Hargreaves Nuttall may be consistent with your view: but what do you say to the invoices?]* It does not appear that the plaintiff, when he drew the bills and made out the invoices, had notice that the defendant was a member of the firm. And, if he had, it makes no difference. *Robinson v. Wilkinson*, 3 Price 538, shows that the plaintiff's rights are unaffected by the circumstance of his having received the bills. There, as here, bills had been drawn upon the ostensible partner; and Wood, B., said,—“This defendant was not known to be a partner when the goods were supplied; but, as soon as his partnership is discovered, the plaintiff sues him. And there is no doubt that in respect of the stores furnished during the period of his partnership he is liable. Then it is contended that the drawing these various bills discharged the defendant. And so it would, *if they had been paid; but drawing bills which are afterwards dishonoured is no discharge.* As far as they were paid, they are a discharge.” *[COCKBURN, C. J.—The first question is, to whom was the credit given? That is purely a question of fact; and I for one must protest against this court being converted into a jury. It is most important to keep separate the law and the facts.]* The credit clearly was given to the firm. If James Hargreaves Nuttall had gone to the *134] plaintiff himself, and had said, “I am ordering *goods for Hoyle, Hargreaves & Co., of Rio, a firm consisting of myself, Robert Nuttall, and one Nash, and I will pay for them by my own acceptances at three months, and the invoices shall be made out to me,”—that would not, without more, have shown that the credit was given to James Hargreaves Nuttall, to the exclusion of the other two. *[COCKBURN, C. J.—This is not a question of agency; it is the case of a dormant partner.] Precisely so.*

The question raised by the demurrer to the replication, is disposed of by a case in this court, of *Maillard v. The Duke of Argyll*, 6 Scott N. R. 938, 6 M. & G. 40 (E. C. L. R. vol. 46), where it was held that a plea that bills were taken and received by the plaintiff “for and on

account" of the debt, and "in payment thereof," did not necessarily import satisfaction. And in *Kemp v. Watt*, 15 M. & W. 672,† the word "discharge" was held to carry the matter no further. [BYLES, J.—In *M'Dowall v. Boyd*, 17 L. J., Q. B. 295, it was held that an averment that a bill of exchange was given "for and on account of and in payment and discharge" of a debt, is not equivalent to an averment that the bill was given in satisfaction of such debt. Wightman, J., says: "It was very properly conceded, that, if the averment amounted only to a delivery 'for and on account of' the debt, the subsequent part of the plea would be immaterial, for, it showed that the bills so given had not been effectual, and the collateral security which would be a good answer while running, for it would operate as a suspension of the cause of action, would be no answer when it had failed. It is contended, therefore, that the words express not merely a suspension but a satisfaction of the debt: that is, that the words 'in payment and discharge' are equivalent to satisfaction. I cannot attribute this meaning to these words. I always distrust the use of supposed *equivalents; and the effect of the two cases referred to is this,—in *Maillard v. The Duke of Argyll*, 6 Scott N. R. 938, 6 M. & G. 40 (E. C. L. R. vol. 46), 'payment' was considered not equivalent to 'satisfaction'; and in *Emblin v. Dartnell*, 12 M. & W. 830,† 'discharge' was decided not to mean 'satisfaction'; for, if the terms of the plea in that case had been equivalent to satisfaction, the replication would have been good. I agree with both cases: and, whatever may be the exact meaning of 'in payment and discharge,' their legal effect is not equivalent to satisfaction." WILLIAMS, J.—In *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 73), "for and on account" is said to amount to a conditional payment.] Accord and satisfaction is a well-known form of plea: and there is no reason why it should be departed from. [BYLES, J.—The plea and replication taken together show a suspension of the remedy, and that the period of suspension has elapsed.]

Manisty, Q. C. (with whom was *Milward*), for the defendant.(a)—Where a person is selling goods to the *agent of a foreign firm, [*136 knowing that he is buying for foreign principals, and knowing who the principals are, and elects to give exclusive credit to the agent, he cannot afterwards, upon failure of the agent, turn round and charge the principals: and it makes no difference that the agent is also a member of the firm. The inference is, that the seller means to trust the agent or the resident partner. And, further, if the seller of the goods

(a) The points marked for argument on the part of the defendant, were,—

"1. That credit was given for the goods in question to James Hargreaves Nuttall:

"2. That the plaintiff, having sold the goods on the terms that he should be paid for them by the acceptances of James Hargreaves Nuttall (the defendant's partner), and having been so paid for the goods, and having endorsed those acceptances to third parties, who have proved them against the estate of James Hargreaves Nuttall, and received dividends in respect thereof out of that estate, the plaintiff cannot now sue the defendant for the price of the goods, or any part thereof:

"3. That the original cause of action (if any) against the Rio firm, has, under the circumstances, been satisfied by James Hargreaves Nuttall's acceptances; and that it is not competent to the plaintiff, after those acceptances have been negotiated and proved, and dividends received in respect of them as aforesaid, to resort to the original cause of action, and to sue one of the partners in the Rio firm for the price of the goods, or any part thereof:

"4. That the second plea shows that the cause of action declared on was satisfied, and that the replication to that plea affords no answer to it."

takes a negotiable security from one member of the firm, and, on his bankruptcy, elects to prove against his estate, and to take a dividend, he cannot afterwards proceed against the others. [CROWDER, J.—Do you find any case, or any dictum, where the agent is also a member of the firm?] None: but it is submitted, that in principle it makes no difference. That notice to the agent of the seller was notice to the seller himself, is clear from Story on Agency, § 140. [WILLIAMS, J.—I do not understand Mr. *Unthank* to deny that the plaintiff would be bound by the knowledge of Atkinson.] The fact of the invoices being made out in the name of James Hargreaves Nuttall alone, coupled with the bills being drawn upon him for the price of the goods, is strongly confirmatory of the presumption that the credit was given to him alone. The invoice is a document of great commercial importance. It speaks for itself. It describes as plainly as language can describe it, that the goods are bought by James Hargreaves Nuttall, and by him alone. In *Smyth v. Anderson*, 7 C. B. 21 (E. C. L. R. vol. 62),—where all the cases, including *Thomson v. Davenport*, are commented upon,—A., as *137] agent of B., a merchant residing abroad, bought *goods of C. At the time of the purchase, A. did not inform C. who was his principal, but the invoices described the goods as bought “on account of B., per A.” C. afterwards drew upon A. for the amount at four and six months, but A. became insolvent before either of the bills arrived at maturity. B., after receiving advice of the purchase, and of the acceptance of the bills by A., made large remittances to A. on account of these and other goods; and A. at the time of his stoppage was considerably indebted to B.: it was held not to be competent to C. to sue B. for the price of the goods. Having once given credit to the party here, the plaintiff could not afterwards shift his claim, and charge the partners abroad: *Leggat v. Reed*, 1 C. & P. 16 (E. C. L. R. vol. 12). Then, having elected to take bills from one of several principals in payment for the goods, and the amount of those bills having been proved by the endorsees against the estate of the acceptor, the vendor’s remedy against the other parties in respect of the original consideration was altogether gone. The general rule, as laid down in *Ford v. Beech*, 11 Q. B. 842, 852 (E. C. L. R. vol. 83), and the authorities there cited, is, that, if a cause of action is once suspended, it is gone for ever. The case of a bill of exchange is an exception to the general rule. Here, the plaintiffs could not have sued James Hargreaves Nuttall upon the bills, and the firm upon the original consideration. The debt upon the bills being proved, the cause of action was gone. *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 73), has no analogy to this case. Could the plaintiff have proved for the bills under James Hargreaves Nuttall’s fiat, and then have sued the firm? Clearly not. [CROWDER, J.—The bankruptcy and certificate of James Hargreaves Nuttall would discharge him; but it would be no discharge of the other two.] It is a joint debt. [COCKBURN, C.—Assume that there was no bankruptcy, *138] but that the bills turned out to be *valueless,—could not the plaintiff have sued the firm?] No doubt. But he could not take the double remedy,—treating the debt as a joint debt for one purpose, and as a separate debt for another purpose. It was competent to the plaintiff to resort to the original consideration, upon the dishonour of the bills: but he could not do that and sue upon the bills also.

[WILLIAMS, J.—It is impossible that there can be any rule of law that should so completely shut out all common sense and justice.] Take the common case of an attorney having a lien upon a client's papers: if, upon the bankruptcy of his client, he proves for his debt, his lien is gone. [WILLIAMS, J., referred to *Ex parte Gemmell*, *In re Boggs*, 3 Mont., D. & De Gex, 198.] In *Ex parte Higgins*, *In re Tyler*, 4 Jurist, N. S. 595, a creditor of a firm consisting of two partners brought an action for the amount of his debt against one only of the partners, and recovered judgment therein: subsequently, both the partners were adjudicated bankrupt: the creditor having sought to prove for the amount of his debt against the joint estate of the bankrupts,—it was held that the joint debt of the two partners was extinguished by the judgment which had been obtained against one of them, and the proof was accordingly rejected.

Unthank, in reply, was stopped by the court.

COCKBURN, C. J.—I am of opinion that the plaintiff is entitled to judgment. Two questions present themselves for the consideration of the court,—first, whether there is any liability on the part of the defendant in respect of these goods,—secondly, whether, if there ever was any such liability, anything has been done on the part of the plaintiff to divest him of the right to proceed against the defendant. It appears that the goods *were ordered by James Hargreaves Nuttall [*139 alone, who was resident at Liverpool, but was a member of the firm at Rio de Janeiro, of which the defendant Robert Nuttall was also a member. It occurred to me at first that this was a case of principal and agent in the ordinary way, and that a question might arise as to whether, the plaintiff proceeding against the defendant as an undisclosed principal,—the dealing having in the first instance been with James Hargreaves Nuttall,—it was open to him, after having through the endorsees of the bills of exchange received a portion of the price from James Hargreaves Nuttall, to divide the transaction, and, having so far treated James Hargreaves Nuttall as the principal, afterwards turn round and insist upon his right to charge the now defendant as principal. But, upon looking further at the facts of the case, it appears to me that it is not a case of principal and agent at all, but a pure question of partnership liability. The goods were ordered by James Hargreaves Nuttall, a member of the firm, on account of the firm, and the firm had the benefit of them. It is true that James Hargreaves Nuttall did not in terms order the goods for the firm: but it was known to the person who was acting for the plaintiff that there was this firm, that James Hargreaves Nuttall was a member of it, and that the goods were to be applied to the use and for the benefit of the firm. It is, therefore, the ordinary case of one partner ordering goods for a firm, there being a third person a member of the firm who was not known to the seller as such at the time of the transaction. Under ordinary circumstances, undoubtedly, the unknown partner is liable equally with the person who appears in the transaction, when discovered, and the seller may equally have recourse to him for payment. But it is said that that ordinary rule may become inapplicable, if the seller, having *notice of the partnership, chooses, instead of relying upon the firm, to adopt the liability of the particular individual with whom [*140 he is dealing. As a proposition of law, that cannot be contested. If

the seller refuses to deal with the firm, but elects to deal exclusively with the individual, he cannot afterwards treat the firm as his debtors, and sue one whom he did not mean to trust. That brings it to the real question in this case, which is one simply of fact, viz. whether the credit was given to James Hargreaves Nuttall only, to the exclusion of the firm of which he was a member. In support of the affirmative of that proposition, Mr. *Manisty* relies upon two things,—first, that bills for the price of the goods were, pursuant to a stipulation to that effect, drawn upon and accepted by James Hargreaves Nuttall only,—secondly, that the invoices were made out in the name of James Hargreaves Nuttall alone, and not in the name of the firm. These are facts which would have well deserved the attention of a jury, if, as I think it ought to have been, this case had been submitted for the decision of a mercantile jury. However, as the case is now before us, we must deal with the facts as we best can; and I do not think we are justified in holding that these circumstances neutralize and overpower the strong probabilities of the case. One who sells goods to a firm has in the first instance the security of the firm for payment; and, failing that, he has also the security of the separate estates of the individual members of the firm, their separate liabilities having first been discharged. It is not to be assumed, without some cogent evidence, that a man to whom the law has given this double advantage should relinquish a part of it. The fact of the bills for the price of the goods having been drawn upon James Hargreaves Nuttall alone, is not inconsistent with any other view than that *141] of his being solely and *exclusively liable. It may very well have been that, as this was a foreign firm, while James Hargreaves Nuttall was known to be resident at Liverpool, bills drawn upon and accepted by him would be more readily negotiable than if drawn upon a firm in Rio de Janeiro. Then, as to the invoices,—one can understand why, as a matter of convenience, these should be made out in the name of James Hargreaves Nuttall alone, instead of in that of the firm, it being part of the arrangement that the goods should go to Southampton, there to await his orders. The facts, therefore, which are relied on by Mr. *Manisty* do not appear to me to be of such cogency and importance as to outweigh the manifest probabilities of the case, and to induce us to adopt the arguments urged on the part of the defendant. This disposes of the first part of the case. Looking at all the facts, I think the only reasonable conclusion we can arrive at is, that credit was not given to James Hargreaves Nuttall exclusively, but that the plaintiff dealt with him as a member of the firm, knowing of the existence of the partnership, and intending to have the security of the firm.

Then comes the second question, which Mr. *Manisty* has not, I think, argued with the same degree of confidence as he did the first, namely, whether what the plaintiff has done estops him from having recourse to the now defendant Robert Nuttall for the residue of the original demand which has not been satisfied out of the estate of James Hargreaves Nuttall. I asked in vain for an authority for the proposition, that, where an acceptance is given by an individual member of a firm for goods supplied to the firm, and the party giving the acceptance becomes bankrupt, and a portion of the amount is realized from his estate, the drawer is estopped from proceeding against the other members of the

firm, or against the partnership estate, for the *residue. It appears to me to be contrary to common sense and justice, that, [*142 because a portion of the bill has thus been liquidated out of the estate of the acceptor, the drawer is to forego all remedy against the partnership estate for the residue. In the absence of any authority for such a proposition, I am not prepared to give effect to such an argument. It is true, the acceptance operates a suspension of the drawer's remedy until the maturity of the bill; but, the bill being unpaid when it becomes due, the drawer may treat it as waste-paper, and proceed for the original consideration. So, if a portion only of the amount is obtained from the acceptor, whether through payment by himself, or through the medium of a proof in bankruptcy against the acceptor, appears to me to make no difference either in principle or in justice and good sense. I am not disposed, thereof, to establish a precedent, that, under such circumstances as these, the plaintiff's remedy is affected by his receipt of a portion of the price of the goods from the estate of James Hargreaves Nuttall. Upon that ground also, therefore, I am of opinion that the plaintiff is entitled to our judgment.

WILLIAMS, J.—I am entirely of the same opinion. As to the first point, it appears that the goods the price of which is sought to be recovered in this action were bought by James Hargreaves Nuttall in the course of conducting the business of a partnership of which the now defendant was a member, and the benefit of which goods was enjoyed by the defendant in common with all the other members of the firm. Now, it is clear, that, according to the ordinary rules of law, although the goods were bought by James Hargreaves Nuttall in his own name, all who were members of the firm at the time, and who consequently shared in the benefit of the transaction entered into by him on their *behalf, would be liable. But I quite agree that it was competent to the plaintiff to rely, if he pleased, solely and exclusively [*143 upon the credit and responsibility of the partner resident here with whom he dealt. In order, however, to take a case thus out of the ordinary rule of the law of partnership, it must, I apprehend, be shown most clearly that the seller of the goods did intend to rely solely upon the one partner, to the exclusion of the liability of the rest of the firm. For the reasons given by the Lord Chief Justice, which it is unnecessary to repeat, I do not think it has been satisfactorily made out that the plaintiff did so elect. It is enough to say that the defendant has, upon the facts submitted to us, failed to establish the proposition which he was bound to establish in order to entitle him to judgment.

That being disposed of, it brings it to the ordinary case of a sale of goods to a firm consisting of three members, and a bill taken from one for the price. Much discussion has taken place in numerous cases in modern times as to the effect of giving a bill or note "for and on account" of a debt, as contradistinguished from "in satisfaction and discharge," during the currency of the instrument. For a long time, and down to the case of *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63), it was taken for granted that the taking a bill or note "for and on account of" the debt operated as an exception to the general rule of law that a suspension of the remedy for ever discharged the debt. But the late Mr. Justice Maule, in a very elaborate judgment pronounced by him in a case of *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 73),

expresses a strong opinion that the decision of the Exchequer Chamber in *Ford v. Beech*, though right in substance, was wrong as to the principle upon which it proceeded. That very learned judge denies that the doctrine in question was any exception to the rule at all; and so *far *144] he dissents from the principle upon which the cases had been supposed to be based. That, however, leaves the main question precisely where it was. I must confess I have always entertained some doubt as to the principle enunciated by the earlier part of the judgment in *Belshaw v. Bush*: but I have no doubt or difficulty whatever in adopting the latter part, where the learned judge lays down the true doctrine upon which this branch of the law is founded, viz., that, in the case of a money demand, if the creditor accepts a bill or note for and on account of the debt, that operates as a conditional payment. In the present case, a bill is taken from one member of a firm for and on account of a debt due from the firm. The destiny of the bill is this,—it gets from the hands of the plaintiff, the drawer, into the hands of an endorsee: the acceptor becoming bankrupt, the endorsee succeeds in obtaining a portion of the amount under the fiat against him; and then the bill is returned to the drawer, who pays the endorsee the difference. Now, the rule of law, as established in all the cases, and summed up by Maule, J., in *Belshaw v. Bush*, is this, that a bill which is given for and on account of a debt, is to be taken as a conditional payment: and the question here is, whether the condition to defeat the payment has or has not happened. If the bill has been returned to the creditor unpaid, without any laches on his part, the condition which was to defeat the payment has happened, and consequently it is no payment. It is obvious that that principle is not to be confined to the case of a total non-payment, but must operate to a partial extent if a portion of the amount of the bill is paid,—it will be a good payment pro tanto. Now, here, the condition has happened as to part: the bill has come back to the hands of the drawer, to whom it was given for and on account of his debt, *145] partially unpaid. There *is, therefore, a partial happening of the condition upon which the payment was to be defeated. It operated, consequently, as a part payment only; and I am clearly of opinion that the plaintiff is entitled to maintain his action for the residue.

CROWDER, J.—I also am of opinion that the plaintiff is entitled to recover. The main ground upon which the argument to the contrary proceeded, was, that the partner resident here acting as agent for the firm abroad, those principles and those dicta in the books as to the relative position of an agent in this country acting for a foreign principal are applicable to the present case. It seems to me, however, that this being a case of partnership,—one of the members of the firm residing in this country and the others at Rio de Janeiro,—and not merely a case of principal and agent, those cases have little or no bearing upon the question. In the case of an agent, where an English merchant residing in this country buys goods for a foreign principal, the presumption is that the merchant who sells obtains a considerable benefit by having a person resident here responsible to him for the price of the goods. That is the foundation of the doctrine of *Paterson v. Gandasequi*, 15 East 62, and *Addison v. Gandasequi*, 4 Taunt. 574, and that class of cases. But this is a case of partnership, where the ordinary principle

of partnership law applies, viz., that where goods are sold to a firm, every member of it is answerable, whether he be a dormant or an ostensible partner, unless there be some special contract that one or more of them alone shall be answerable. In order to establish that which has been contended for on the part of the defendant, strong and conclusive grounds should have been shown for believing that there was a special contract to limit the liability to James Hargreaves Nuttall.

*Now, what are the facts which are relied on for that purpose? [*146] They are only two,—first, that bills were drawn upon and accepted by James Hargreaves Nuttall alone for the price of the goods,—secondly, that the invoices were made out in his name alone. I see nothing in these two facts to warrant the inference which is sought to be established, or to induce us, sitting as a jury, to conclude that there was a special contract making James Hargreaves Nuttall exclusively the debtor. With respect to the bills, it is by no means unusual to stipulate for a particular mode of payment; and the plaintiff may well have thought it more convenient to have the acceptances of a merchant known here than those of a firm resident in a remote part of the world. Then, the fact of the invoices being made out in the name of one partner only does not necessarily exclude the liability of the other members of the firm. I must confess I see no very great force in either of the facts relied on by the defendant; and taken together they fail to lead my mind to the conclusion that the credit was given to James Hargreaves Nuttall alone.

As to the rest of the case, the argument on the part of the defendant is, that, assuming that there was no such arrangement as suggested for the English partner to be exclusively responsible for the price of goods supplied, the plaintiff has, by that which passed after the maturity of the bills, estopped himself from proceeding against the present defendant to recover the balance remaining due. Upon that point, I assent entirely to the doctrine laid down by my Brother Williams, that the payment was conditional, and that the event has happened which was to defeat the condition *pro tanto*,—the rule being equally applicable to a partial as to a total defeat. I therefore think the plaintiff is entitled to recover the amount which remains unpaid.

*The same points arise upon the demurrer, and upon that for [*147] the same reasons the plaintiff must have judgment.

BYLES, J.—I also am of opinion that the plaintiff is entitled to recover. Whether this was a proper question for the court, being rather one of fact than of law, I will not say: but it is clear that Mr. *Manisty* did wisely in getting it reserved for the court; for, the case finds that the goods were sold and delivered to the defendant and his partners, and received and used by them in their business, and that the bills given in payment were not paid; and, under these circumstances, it would have been a very extraordinary special jury that could have had any hesitation in finding for the plaintiff. I agree that the knowledge of Atkinson must be taken to be the knowledge of the plaintiff. By the terms of the contract, the vendor was intending to sell the goods to the firm, and the goods were delivered to the firm, and the firm (of which the defendant was a member) had the full benefit of them. *Primâ facie*, therefore, the firm ought to pay for them. It was a part of the contract that bills accepted by one member of the firm should be taken as a conditional payment. The fair result of the whole transaction is, that there was to

be the joint liability of the whole firm, and in addition the separate liability of one of its members. It is urged that the taking the separate acceptance of the one partner was inconsistent with the joint liability of the three. I do not, however, see any inconsistency in that. As the one partner, James Hargreaves Nuttall, was resident in this country, and the others resided at Rio de Janeiro, the plaintiff may well have thought that it would be more convenient to him to have the acceptances of the former. Nothing was afterwards done which could be said to be *148] inconsistent with the joint liability of all the members of the firm, unless the circumstance of the invoices being made out and delivered to James Hargreaves Nuttall alone can be said to be so. These probably were delivered by mistake, the man who delivered them having no personal knowledge as to who were the members of the firm. That, however, at the most, only raises a question for the jury. So much, therefore, for the bills, and so much for the invoices. Then it is said that the subsequent course of conduct on the part of the plaintiff was such as to destroy the joint liability. Now, the joint liability has never been dealt with at all. With respect to the separate liability,—the bills accepted by James Hargreaves Nuttall,—it is the first learning that taking a bill for and on account of a debt does not operate as an absolute discharge of the debt. At the most it is only a conditional payment, which is defeated by the subsequent dishonour of the bill, whether total or partial. The debt not having been paid in this collateral way, the plaintiff was remitted to the joint liability of the firm. Whether, therefore, the question be one of fact or of law, our judgment must equally be in favour of the plaintiff.

Judgment for the plaintiff.

As to the effect of receiving the note where the American authorities are collected and discussed with great acuteness and ability. See also, on the 1 Smith's Lead. Cas. (5th Am. Ed.) question of payment, *M'Intyre v. Kennedy*, 29 Penn. St. 448. 453; and note to *Tobey v. Barber*, and *Okie v. Spencer*, 2 Am. Leading Cases,

*149] *HUTCHINSON and Another v. GUION and Others. July 5.

Declaration against the defendants, shipowners, for negligently and carelessly stowing salt-cake, whereby it sustained damage.

Fourth plea,—that the damage complained of arose from the salt-cake being delivered by the plaintiffs in bulk and not in casks, and being shipped by the plaintiffs in bulk, and consequently stowed by the defendants in bulk and not in casks, and between and amongst other goods; and that the same was stowed in the manner in which the same was actually stowed, with the knowledge, and by the direction and license of the plaintiffs to the defendants given before and during such stowage, &c.:—Held, that this plea did not amount to an allegation that the negligent stowage of the article took place by the authority of the plaintiffs, and was no answer to the action.

Fifth plea,—that salt-cake was a corrosive and destructive substance, rotting casks and other substances being in contact with it, which the plaintiffs knew, but which the defendants, without any default on their part, did not know, and could not reasonably be expected to know, until after the happening of the damage complained of; that it was the duty of the plaintiffs, before or at the time of the shipment or stowage, to have informed the defendants,

and to have used due and reasonable care in ascertaining that the defendants were informed of the corrosive and destructive nature of salt-cake, in order to its proper and safe stowage by them; that the plaintiffs did not so inform the defendants, or ascertain that they were so informed, but, on the contrary, improperly and negligently delivered the salt-cake to the defendants in bulk, and the plaintiffs thereby and otherwise represented to the defendants and induced them to believe, and they did reasonably believe, that the said salt-cake might be placed in contact with casks, &c.; that, under this reasonable belief, and induced as aforesaid, the defendants stowed the said salt-cake in contact with and between and amongst casks of salt provisions, being, as they reasonably believed, a safe and proper mode of stowing the same; and that afterwards, and without default of the defendants, the said salt-cake corroded, rotted, and destroyed the said casks, and the hoops thereof, and the brine therefrom damaged the salt-cake, and caused the default in the delivery thereof complained of in the declaration.

Replication,—that salt-cake is an article of merchandise well known in trade and commerce, and the nature and properties of which are well known in trade and commerce, and is an article of merchandise commonly carried in ships, and the nature and properties of which are commonly and well known to persons carrying on the trade and business of carriers by water, and that, at the time of the shipment, the defendant well knew that the goods were salt-cake :—

Held, that the fifth plea was good, and the replication no answer to it: for, if the defendants' ignorance arose from the wilful misrepresentation of the plaintiffs, such ignorance was justifiable.

THE declaration stated that the plaintiffs, theretofore, to wit, on the 7th of August, 1857, caused to be shipped on board a ship called the *Australia*, then lying in the port of New York, whereof the defendants were the owners, divers goods and chattels, to wit, salt-cake, then represented to be, and then lying, in good order and well conditioned, to be carried to, and delivered in like good order and well conditioned at, the port of Liverpool, the dangers of the sea excepted, and the said owners not to be accountable for fire, collision, or breakage or leakage, to the plaintiffs, their order, or *assigns, upon payment of certain freight [*150 for the said goods then agreed upon, such payment to be made immediately on the landing of the said goods, without discount or allowance of credit; and the defendants then received the said goods on board the said ship upon the terms aforesaid: Averment, that, although all matters and things had been done and had happened, and all time had elapsed, which entitled the plaintiffs to maintain this suit; yet the defendants did not nor would use due and proper care in and about the stowage of the said goods on board the said ship, but on the contrary, did so negligently and carelessly stow the said goods and the cargo of the said ship on board the said ship, that by reason thereof, and not by reason of any of the aforesaid perils or casualties, the said goods were damaged and injured; and the defendants made default in delivering the said goods in the like good order and well conditioned, as in the said agreement mentioned; and by reason of the premises the plaintiffs suffered great loss and damage, and were deprived of making divers large gains and profits by the sale of the said goods and chattels which they otherwise would have made: To the damage of the plaintiffs of 100*l*.

Fourth plea,—that the default and damage alleged and complained of arose from the said salt-cake being delivered by the plaintiffs to the defendants in bulk and not in casks, and being shipped by the plaintiffs in bulk, and consequently stowed by the defendants in bulk and not in casks, and between and amongst other goods; and that the same was stowed in bulk and not in casks, and was stowed in the manner in which the same was actually stowed, with the knowledge and by the direction and

license of the plaintiffs to the defendants given before and during such stowage and the remaining of the salt-cake on board.

*151] Demurrer to the fourth plea, alleging for cause, *¹⁴ "that if the knowledge and direction and license in the plea mentioned are pleaded as a part of the original agreement in the declaration mentioned, they form a stipulation consistent with and not varying the undertaking of the defendants in the declaration mentioned; and, if they are pleaded as a knowledge, direction, and license given by the plaintiffs after the making of the contract in the declaration mentioned, they do not vary the undertaking of the defendants in the declaration mentioned, or excuse its performance."

Fifth plea,—that the said salt-cake was a corrosive and destructive substance, rotting casks, cask-hoops, and other substances being in contact with it, which the plaintiffs at all times knew, but which the defendants, without any default on their part, did not know, and could not reasonably be expected to know, until after the happening of the damage and other matters complained of; and it was the duty of the plaintiffs before or at the time of the shipment, or before the stowage of the said salt-cake, to have informed the defendants, and to have used due and reasonable care in and about ascertaining that the defendants were informed, of the corrosive and destructive nature of the salt-cake, in order to the proper and safe stowage of the same, and the defendants received and stowed the same in the supposition and belief (and relying on the same) that the plaintiffs would so have informed them if the said salt-cake were so destructive and corrosive, or requiring to be stowed apart from other substances; and that the plaintiffs did not at any time so inform the defendants, or take reasonable or any care in and about so informing the defendants, or ascertaining that they were so informed: and the plaintiffs, on the contrary, improperly and negligently delivered the said salt-cake to the defendants in bulk, and not in casks, *152] and the plaintiffs thereby and otherwise represented to *the defendants, and caused and induced the defendants to believe and suppose, and they did reasonably believe and suppose, at the time of stowage, and always until after the happening of the said damage and matters complained of, that the said salt-cake might be placed in contact with casks, cask-hoops, and other substances, safely and without danger of corrosion or destruction of such casks, hoops, or other substances, and under this reasonable belief, and induced as aforesaid, the defendants stowed the said salt-cake in contact with and between and amongst casks of salt provisions, being, as the defendants reasonably believed, a safe and proper mode of stowing of the said salt-cake and casks, and afterwards, without default of the defendants, the said salt-cake corroded, rotted, and destroyed the said casks and the hoops of the said casks, and in consequence thereof, and without the defendants' default, certain brine and salt liquor in the said casks flowed out of the said casks amongst the said salt-cake, and washed parts of the same away, and caused the damage and injury complained of, and necessarily caused the default in delivering the said salt-cake in the like good order and well conditioned, as in the declaration complained of.

Replication to the fifth plea,—that the said goods in the declaration and in the said plea mentioned were and are salt-cake, as in the said plea mentioned, and that salt-cake is an article of merchandise well

known in trade and commerce, and the nature and properties of which are well known in trade and commerce; and that salt-cake is an article of merchandise commonly carried in ships, and the nature and properties of which are commonly and well known to persons carrying on the trade and business of carriers in ships and by water; and that, before and at the time of the shipment in the said plea mentioned, the defendants well knew *that the said goods in the first part of the replication mentioned were and was salt-cake. [*153

Demurrer to the fifth plea, alleging for cause, "that the facts in the plea alleged do not vary the undertaking of the defendants in the declaration mentioned, or excuse its performance; that the defendants were bound to take notice of the nature and qualities of the goods which they undertook to carry and deliver; that in the absence of fraud in the plaintiffs, the defendants were bound to deliver the goods according to their undertaking, as in the declaration mentioned; that, in the absence of any concealment by the plaintiffs of the nature of the goods, the defendants were bound to take notice of the qualities of such goods; that the fact of the goods being delivered by the plaintiffs to the defendants in bulk, and not packed, obliged the defendants to take notice of the nature and qualities of the goods, and was equivalent to notice to the defendants of the nature and quality of the goods."

The defendants demurred to the replication to the fifth plea, alleging for cause "that the averments therein do not answer the matters alleged in the plea." Joinders.

Brett, for the plaintiffs.(a)—The question is, whether, if a merchant ship on board a general ship, under a *bill of lading in the ordinary form, goods the nature and properties of which are well [*154 known in the mercantile world, and the shipowner accepts them, but in consequence of their action upon other goods forming part of the cargo, they are delivered at their destination in a damaged state, the shipowner is absolved from the liability which his contract imposes upon him, because the deleterious nature of the article was known to the shipper, and unknown to the shipowner. The carrier is bound by his contract to deliver the goods intrusted to him in good order: the only way in which he can relieve himself from that obligation, is, by showing, that, through the fraud of the owner of the goods, the contract never attached, or was rescinded or discharged. The declaration states that the goods were delivered upon a common bill of lading: the averment that they were negligently and carelessly stowed is mere surplage:

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

On the demurrer to the fourth plea,—"That, if the knowledge, direction, and license in the plea mentioned are pleaded as a part of the original agreement in the declaration mentioned, they form a stipulation consistent with the undertaking of the defendants therein relied on; and if they are pleaded as had and given after the contract, they do not vary the undertaking of the defendants relied on, or excuse its performance."

On the demurrer to the fifth plea,—"That the facts in the plea mentioned do not vary the undertaking of the defendants in the declaration, or excuse its performance; that the defendants were bound to take notice of the nature and qualities of the goods which they undertook to carry; that, in the absence of fraud in the plaintiffs, the defendants were bound to deliver the goods according to their undertaking; that, in the absence of any concealment by the plaintiffs of the nature of the goods, the defendants were bound to take notice of the qualities of such goods; and that the fact of the goods being in bulk was equivalent to notice of the nature and quality of them."

On the demurrer to the replication to the fifth plea,—"That the facts therein mentioned show that the defendants were bound to take notice of the nature and qualities of the salt-cake."

all that it was necessary for the plaintiff to prove, in order to sustain the action, is, the non-delivery of the goods at their destination in good order. The fourth plea, at the utmost, can only amount to leave and license, and consequently is a bad plea: *Dobson v. Espie*, 2 Hurlst. & N. 79.† [WILLIAMS, J.—The defendants in effect say that the damage was *attributable to the plaintiffs' own act. It is like a plea *155] to an action upon a bond for performance of an act, that the performance became impossible by the act of the obligee. WILLES, J.—The plaintiffs may be supposed to have said at the time of the delivery of the goods,—“Stow them so and so, but mind we rely upon your undertaking to carry and deliver safely.”] In *Robinson v. Dunsmore*, 2 Bor. & P. 416, it was held, that, if A. sends goods by B., who says, “I will warrant they shall go safe,” B. is liable for any damage sustained by the goods, notwithstanding A. send one of his own servants in B.'s cart to look after them. There was nothing in the contract here to bind the defendants to stow the goods according to the directions of the plaintiffs. *Bourne v. Gatcliffe*, 3 M. & G. 643 (E. C. L. R. vol. 42), 3 Scott N. R. 1, is also an authority to show that this is a bad plea.

As to the fifth plea,—the allegation of duty is surplusage, where the facts show a legal duty, and it is useless where they do not: *Brown v. Mallett*, 5 C. B. 599. The fifth plea is in substance this, that salt-cake is of a corrosive and destructive nature, that the plaintiffs knew it, and the defendants did not. [BYLES, J.—And could not reasonably be expected to know it, and did what they did without default.] Being carriers, the defendants were bound to know the nature and properties of the article. If they were ignorant of them, they were bound to inform themselves. The law casts upon the plaintiffs no duty to convey the information to them. [WILLES, J.—The plea alleges that the plaintiffs by delivering the salt-cake in bulk, and otherwise, represented to the defendants, and induced them to believe, that they might safely stow it as they did. That is fraud.] That does not amount to an allegation of fraud. [BYLES, J.—It is enough if the circumstances show fraud.] In *Tichburne v. White*, 1 Stra. 145, King, C. J., says,—“If *156] a box is delivered generally to a *carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But, if the carrier asks, and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases I hold the carrier is not liable.” [WILLIAMS, J.—If that is a material and issuable averment, you probably will not deny that the plea is a good one.] If the plea shows that the defendants' ignorance arose from the wilful misrepresentation of the plaintiffs, their ignorance is justifiable. The non-communication by the plaintiffs of the deleterious qualities of the salt-cake affords the defendants no excuse for their breach of contract to deliver it in good order: *Walker v. Jackson*, 10 M. & W. 161.† Parke, B., there says: “I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that, if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary: if he asks no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is.” *Baily v. Merrel*, 3 Bulstr. 94, *Stuart v. Crawley*, 2 Stark. N. P. C. 323 (E. C. L. R. vol. 3), and *Beck v. Evans*, 16 East

244, are to the same effect. It may be conceded, that, if the allegations in the plea amount to fraud, there is no contract: *Gibbon v. Paynton*, 4 Burr. 2298; *Batson v. Donovan*, 4 B. & Ald. 21 (E. C. L. R. vol. 6). This plea is virtually an attempt to extend the doctrine of *Brass v. Maitland*, 6 Ellis & B. 470 (E. C. L. R. vol. 88). There, goods of a dangerous nature were delivered to a shipowner to be carried, but were so packed as to conceal their real character; and, in consequence of the insufficiency of the packages, other parts of the cargo were injured; and it was held by Lord Campbell and Wightman, J., that the action lay: but Crompton, J., thought otherwise, on the ground that it was the duty of the shipowner to make inquiries.

**Aspland, contra.* (a)—This is an action for negligence by reason of bad stowage: the whole declaration must be read [*157 together: *Harris v. Mantle*, 3 T. R. 307. "To be safely and securely carried," means, subject to all implied exceptions: *Ross v. Hill*, 2 C. B. 877 (E. C. L. R. vol. 52). The argument on the other side assumes that the defendants are common carriers. The declaration, however, does not so allege; and the court will not assume it. [COCKBURN, C. J.—We would amend the declaration in that respect if necessary. *Brett* referred to *Dale v. Hall*, 1 Wils. 281. WILLIAMS, J.—There is enough on the declaration to show that it was the defendants' duty to stow the goods properly.] At all events, the fourth *plea is a good answer [*158 to the declaration, whatever its legal effect may be. In Story on Bailments, § 492 a, the learned author, after having in previous sections laid down the general rule as to the responsibility of carriers, says: "But, although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the

(a) The points marked for argument on the part of the defendants, were as follows:—

On the demurrer to the fourth plea,—"That the fourth plea shows that the acts constituting or occasioning the breach relied on were the plaintiffs' own acts, and that they contributed to and caused the alleged damage; that the same were committed by the plaintiffs' procurement, and by their license, in any of which cases the plaintiffs have no right to sue; and that the plea also sufficiently negatives the negligence in the stowage relied upon as the breach."

On the demurrer to the fifth plea,—"That the fifth plea in like manner sufficiently negatives the breach, and also shows that the damage arose by the plaintiffs' own default, and by their conduct and representations to the defendants, and by their procurement; and that the plaintiffs, under the circumstances alleged in the plea, were bound to inform the defendants of the destructive and dangerous character of the article shipped."

On the demurrer to the replication to the fifth plea,—"That the replication is no answer to the fifth plea, for the following amongst other reasons,—that it does not state, that, at the time of shipment, the article was well known, or that at that time the defendants knew, or might reasonably be expected to know, its destructive and dangerous nature and properties; and that it admits the conduct and representations of the plaintiffs, and the absence of negligence in the defendants, as stated in the plea."

ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for, the carrier's implied obligations do not extend to such cases." And in Kent's Commentaries, 8th edit., vol. 2, p. 786, the rule is said to be "subject to a reasonable qualification; and, if the owner be guilty of any fraud or imposition in respect to the carrier, as, by concealing the value or nature of the article, or delude him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods." In *Hovill v. Stephenson*, 4 C. & P. 469 (E. C. L. R. vol. 19), *159] where the cause of complaint in an action *on a charter-party by the freighters against the owner of a vessel, was, that a full cargo was not taken in consequence of arrangements in the stowage varying from those contemplated by the charter-party, it was held that the plaintiffs were not entitled to recover, it appearing that one of them, and the broker who managed the business, were present from time to time during the loading, and cognisant of the arrangements, but did not make any objection. So in *Major v. White*, 7 C. & P. 41 (E. C. L. R. vol. 32), it was held, that, if the shipper of goods was warned as to the way in which the goods would be stowed, the consignee cannot maintain any action for damage occasioned by such stowage, even if the stowage were bad.

The fifth plea is clearly good upon the grounds upon which all the judges agree in *Brass v. Maitland*, 6 Ellis & B. 470 (E. C. L. R. vol. 88). There, the first count stated that the plaintiffs were owners of a general ship; that the defendants caused a corrosive substance to be packed in casks and delivered to the plaintiffs as casks of bleaching-powder, to be carried in the ship; that the plaintiffs and their agents were ignorant that bleaching-powder contained a corrosive substance, and the casks outwardly appeared sufficient; but that the casks were insufficient, and the contents so improperly packed that the corrosive contents escaped and destroyed the cargo. The second count stated, that the defendants shipped a dangerous article, knowing it to be such, without notice of its danger; and that the plaintiffs, without knowledge of its dangerous nature, received it, and stowed it in the hold, where it did mischief. The defendants pleaded,—thirdly, to so much of the third count as related to the insufficiency of the packages, that the defendants purchased the goods ready packed, from third persons (named), and were not themselves, or by their servants, guilty of negligence,—*160] *fourthly, to the first count, that the persons employed on the ship knew and had the means of judging of the sufficiency of the casks,—tenthly, to the second count, that the master of the ship knew, or had the means of knowing, the dangerous nature of the goods. On demurrer to the pleas, it was held by Lord Campbell, and Wightman, J., that there is an implied undertaking on the part of shippers of goods on board a general ship, that they will not deliver to be carried on the voyage packages of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice; and that, consequently, *both counts* were good, and *the third plea* bad: but that the fourth and tenth pleas (which they construed to amount to an allegation

of facts equivalent to notice) were good. Crompton, J., held, that the implied undertaking of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without notice; that, on the first count and third plea, taken together, the defendants appeared to be innocent shippers of goods, dangerous in fact, but without any negligence on their part; and that, therefore, the defendants should have judgment on the third plea. *He agreed with the rest of the court that the fourth plea was good, and the second count good*; but he construed the tenth plea as not amounting to an allegation of notice, and therefore held it bad. Independently of that, the present falls within that class of cases where it has been held that the plaintiff is precluded from maintaining an action, where his own negligence or misconduct has occasioned or contributed to the injury of which he complains: *Miles v. Cattle*, 6 Bingh. 743 (E. C. L. R. vol. 19), 4 M. & P. 630; *The Great Northern Railway Company*, app., Shepherd, resp., 21 Law J., Exch. 286. It was the duty of the plaintiffs to inform the *shipowners [*161 of the dangerous nature of the goods; not having done so, the latter are absolved from all responsibility which would otherwise have attached to them.

The replication is altogether irrelevant. It speaks of the knowledge of shipowners at the time of the replication, not at the time of the delivery of the goods for shipment.(a)

Brett, in reply, referred to *Butcher v. The London and South Western Railway Company*, 16 C. B. 13 (E. C. L. R. vol. 81).

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:(b)—This was an action against the defendants, shipowners, for the negligent and improper stowage of the plaintiffs' goods, whereby they sustained damage. The first question arises upon a plea,—the fourth,—which states that the default and damage complained of arose from the goods (salt-cake) being delivered by the plaintiffs to the defendants in bulk and not in casks, and being shipped by the plaintiffs in bulk, and consequently stowed by the defendants in bulk and not in casks, and between and amongst other goods; and that the same was stowed in bulk and not in casks, and was stowed in the manner in which the same was actually stowed, with the knowledge and by the direction and license of the plaintiffs to the defendants given before and during such stowage and the remaining of the salt-cake on board. To that plea there is a demurrer. There is then a plea founded upon the fact that the plaintiffs knew and that the defendants could *not reasonably be [*162 expected to know that salt-cake was a corrosive and destructive substance, rotting casks, cask-hoops, and other substances being in contact with it, and that the plaintiffs, in breach of their duty, neglected to inform the defendants of that fact, and that the injury complained of was the consequence of such negligence and breach of duty on the plaintiffs' own part. To this there is a replication which states in substance that salt-cake is an article of merchandise well known in trade and commerce, and the nature and properties of which are well known; that it is commonly carried in ships, and that its nature and properties are commonly and well known to persons carrying on the trade and business

(a) It was agreed that the replication should be amended in this respect.

(b) The argument took place before Cockburn, C. J., Williams, J., Willes, J., and Byles, J.
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of carriers in ships and by water; and that, before and at the time of the shipment, the defendants well knew that the goods consisted of salt-cake. To this there is also a demurrer. There is likewise a demurrer to the fifth plea. The court retains the impression which was produced by the argument, namely, that the fourth plea is no answer to the declaration. The declaration complains of negligent and careless conduct on the part of the defendants in the stowage of the plaintiffs' goods; and the fourth plea in substance alleges that the salt-cake was stowed in the manner in which the same was actually stowed, with the knowledge and by the direction and license of the plaintiffs. If that could be considered as setting up a leave and license to act with the carelessness and negligence complained of, by reason of any stipulation in the contract between the parties, it might be a good plea: but it is not pleaded in that sense or with that object; and we think it ought to be read according to the plain and obvious meaning of the words, as being no more than a plea that the plaintiffs had authorized the defendants to stow the *163] salt-cake in bulk. That clearly does not amount to an *authority to stow it in a careless or negligent manner. The fourth plea, therefore, affords no answer to the action, and consequently the plaintiff must have judgment on the demurrer to that plea. With respect to the fifth plea, and the replication thereto, we are of opinion that the defendants are entitled to judgment, inasmuch as we think that the plea is good, and that the replication is no answer to it. The reason why the replication is no answer to the fifth plea is well explained by Crompton, J., in *Brass v. Maitland*, 6 Ellis & B. 470 (E. C. L. R. vol. 88). We do not think it necessary to say more than that the reasoning of that learned judge there is correct, especially with respect to the sort of persons who receive goods for conveyance on board ships, and who may not have the means of knowing the character of the articles which are delivered to them. This is quite enough to lead the court to the conclusion that the replication to the fifth plea is sufficient. The plaintiffs deliver to the defendants an article which they know to be likely to cause injury to other goods with which it may come in contact, as well as to itself; and they deliver it to the mate of the defendants' vessel without communicating to him the fact that it is of a nature to be likely to cause injury; and injury does result. It is no answer for the plaintiffs to say that the defendants might and ought to have known,—the article being well known in commerce,—that it possessed those deleterious properties. Crompton, J., in the case referred to, goes very fully into the matter, and we do not think it necessary to do more than refer to his judgment. It is enough to say that we entirely concur in the opinion he there expresses, and, founding ourselves upon it, we give judgment for the defendants upon that part of the case.

The result is that we give judgment for the plaintiffs upon the demurrer *164] to the fourth plea, and for the *defendants upon the replication and the demurrer to the fifth plea.

Judgment accordingly.

The question touched upon in the principal case, how far the owner of a vessel is liable to the shipper of goods for damages sustained by reason of con-

tact with, or proximity to, other parts of the cargo, of a dangerous character, is an interesting and important one. If the carrier is bound, on the one hand,

to receive all goods that are offered, without, it is admitted, any right to open and inspect the packages, and is bound, on the other hand, to make good losses occasioned in any possible manner, except by the "act of God, or the public enemy," his position must sometimes be an unfortunate one. Yet such a doctrine as this seems laid down in *Brousseau v. Hudson*, 11 Louisiana Ann. 428. It was there held that a shipowner was liable for damage to goods, caused by the bursting of casks of chloride of lime in the hold, during the voyage; and that it was no defence to show that by the general and known usage of trade, chloride of lime was carried in general ships, nor that, in the particular case, there was no want of proper stowage and dunnage.

But a less severe rule was applied in *Baxter v. Leland*, 1 Blatch. C. C. 526; *Abbott Adm.* 348. There it was held that where an established and well-known usage exists in a particular trade, in regard to the stowage of a general ship, both as to the methods of stowing, and of the different articles to be stowed together, a shipper will be chargeable with notice of the usage, and must give special instructions if he desires a change; otherwise he will be deemed to have assented to the stowage, and cannot recover for any damage to his goods, which is an inevitable consequence of the method employed. Thus, it was at one time a known usage of trade, at certain ports, to stow flour in barrels above in contact with hogsheads of sugar. In the course of a voyage, under such circumstances, the flour, by reason of the heat and moisture of the hold, acting on the sugar, became dam-

aged; and it appeared that it had become known that the stowage of flour in that way always produced more or less injury. The court, nevertheless, exonerated the vessel from liability for the loss, on the ground that the shipper must be presumed to have been acquainted with the usage, and to have assented to the mode of stowage. See *Schooner Reeside*, 2 Sumn. 567. A similar view of the law appears to have been taken by the Supreme Court of the United States, in *Rich v. Lambert*, 12 How. U. S. 347, where it was alleged (though not sufficiently established) that damage to parts of the cargo had been occasioned by stowing salt in bulk in the between decks of the vessel, according to a general and well-known usage. So in *Sabbick v. Prince*, cited in *Abbott Adm.* 357, mulberry trees were shipped on board a vessel known to be laden with wine, in the usual and customary manner. No notice was given by the shipper to the master that such a mode of stowage would be hazardous. On delivery, it was found that the trees were all dead, as it was alleged, through the effluvium generated in the hold by the evaporation and leakage of the wine. It was held that the vessel was not liable.

The shipowner, however, will be responsible if he knowingly permits goods which are likely to be injurious to the rest of the cargo, to be stowed in defective or insecure packages. Thus, where goods were damaged by the leakage of oil casks, which were badly coopered, and noticeably so at the time of shipment, the vessel was condemned to make the loss good: *Schooner Reeside*, 2 Sumn. 567.

THE PATENT BOTTLE ENVELOPE COMPANY v. SEYMER.

July 5.

The infringement of any part of a patent process is actionable, if that part is of itself new and useful, so as that it might be the subject-matter of a patent, and is used by the infringer to effect the object proposed by the patentee.

But the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent.

The plaintiffs took out a patent for "Improvements in the manufacture of cases or envelopes for covering bottles," and in the specification the invention was stated to consist "in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together, so as to form cases or covers to protect bottles from breakage when packed." It then proceeded,—"For this purpose I take equal lengths of rush, straw, or other suitable material, and confine them at one end with a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame," &c.

The defendant made bottle envelopes out of similar materials somewhat differently applied, placing them upon a model of a bottle, or mandril, and fastening the material in a manner somewhat like the plaintiffs' method:—

Held, that the use of the mandril, which was admitted to have been long commonly used for producing given forms of pliable materials, was not an infringement of the plaintiffs' patent; for, that the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent.

THIS was an action for an alleged infringement of a patent for "Improvements in the manufacture of cases or envelopes for covering bottles."

The defendant pleaded the usual pleas, except want of novelty,—amongst them being one (the fifth) "that the said invention was not an invention for improvements in the manufacture of cases or envelopes for covering bottles," and another (the sixth) "that the invention described in and by the instrument in writing in the declaration mentioned (the specification) was a different invention from the invention for which the letters patent were granted."

The plaintiff took issue upon all the pleas.

The cause was tried before Willes, J., at the Summer Assizes for Surrey in 1857. The nature of the plaintiffs' invention and the manner of its performance were thus described in the specification:—

*165] "This invention consists in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together, so as to form cases or covers to protect bottles from breakage when packed. For this purpose, I take equal lengths of rush, straw, or other suitable material, and confine them at one end within a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame, and its lower part is surrounded by a ring, which is capable of being raised and lowered by the operator. The cap being placed on the mould, and retained by any suitable contrivance, the lengths of rush or straw surrounding the mould or form are then tied tightly near the middle of their length below a movable elastic ring on the mould. The ring surrounding the lower part of the mould is then raised by depressing a treadle, by which the lower ends of the rushes or straws will be turned up over the cord and around the mould or form, where they are again tied tightly round it near the upper part: the cap may then be removed, and the upper ends may, if necessary, be tied near their extremities. The case or

cover may then be removed from the mould or form, the elastic ring in being drawn off contracting within a groove on the mould or form, so as to release it from the case or cover; or, in place of forming the cases or envelopes separately, the bottle to be covered may be substituted for the mould or form, and the rush or straw permanently secured thereto.

"Having thus stated the nature of my invention, I will proceed to describe the manner of performing the same.

"The drawing represents a side elevation of a machine combined according to the invention. A.A. is the *framing of the machine, [166 at the upper part of which is fixed a rack B. into a step or notch, in which the upper end of the strut C. enters when the hollow cap D. is brought into position over the top of the pattern E. as is shown in the drawing. The cap D. is fixed to the lever F., which is hinged at G., and it will be raised out of the way when desired by the weight and chain H., when the cover or cap D. is required to be lifted off from above the pattern E. The pattern E. is screwed on to the standard I., affixed to the block J.; and it may be remarked, that, in place of a pattern, it will be evident that the parts might be modified, so as to receive a bottle in place of the upper part of the pattern E., and the machine is arranged for having larger or smaller patterns E. introduced. In the pattern E. is formed a groove E. 1, into which an elastic ring of india-rubber or other suitable material K. may contract, as is indicated by red lines in the drawing; but, when in use, the elastic ring K. is expanded, and is moved down to a position on the pattern E. below the groove, as is shown by black lines, such ring being brought down a distance according to the length of envelope or cover which is intended to be made. L. is a ring carried by a frame, as shown, and it is capable of being raised by a treadle M., so as to be brought into the position shown by the red lines, by which the lower ends of the rushes, straws, or suitable material will be raised up into the position shown in the drawing. In using the machine, the upper ends of the rushes, straws, or other materials are spread round the neck of the pattern E., and in sufficient quantities to cover the larger diameter of the pattern; and this is done when the ring L. is at its lowest position, and the lower ends of the rushes or other materials will cover the exterior of the ring L. The cap D., which has been previously out of the way, is to be brought down, *and the strut [167 placed under one of the notches in the rack above, so as to hold the cap D. in position. The elastic ring K. is placed in its position below the notch E. 1 before commencing to make an envelope or case for a bottle. The rushes or other materials used are to be tied in under the ring K. by a string N. The ring L. is then to be raised into the position shown by red lines, by which the lower ends of the rushes or materials will be folded upwards, and be held in position, as is indicated by the drawing, for their being further tied in by strings at the points shown by the dotted lines (1) (1) and (2) (2). The cap D. is then raised out of the way by unstepping the strut, and the upper ends of the rushes or other materials are to be tied tightly in by a string, which will complete the process of making an envelope or case; and the same may be lifted off the pattern E., the elastic ring K. sliding upwards and contracting into the groove E. 1 in the pattern E., as shown

by red lines in the drawing. In thus using rushes, straw, or other suitable materials for making envelopes or cases for bottles, such materials will be in a damp state when the nature of the materials require to be so, as is well understood.

"Having thus described the nature of my said invention, I would have it understood that what I claim is, the combination of mechanism and the making of envelopes for bottles, as herein described."

There had been a previous provisional specification, which described the invention in the following terms:—"This invention consists in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together so as to form cases or covers to protect bottles from breakage when packed. For this purpose, I take equal lengths of rush, straw, or other suitable material, and *168] confine *them at one end within a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame, and its lower part is surrounded by a ring, which is capable of being raised and lowered by the operator. The cap being placed on the mould, and retained by any suitable contrivance, the lengths of rush or straw surrounding the mould or form are then tied tightly near the middle of their length below a movable elastic ring on the mould. The ring surrounding the lower part of the mould is then raised by depressing a treadle, by which the lower ends of the rushes or straw will be turned up over the cord and around the mould or form, when they are again tied tightly around it near the upper part; the cap may then be removed, and the upper ends may, if necessary, be tied near their extremities. The case or cover may then be removed from the mould or form, the elastic ring in being drawn off contracting within a groove on the mould or form, so as to release it from the case or cover; or, in place of forming the cases or envelopes separately, the bottles to be covered may be substituted for the mould or form, and the rush or straw permanently secured thereto."

It appeared that the defendant made bottle envelopes out of materials similar to those used by the plaintiffs, but which were woven together with threads before being put into form,—the straws or rushes forming the weft, and the threads the warp,—so as to constitute a woven fabric. The fabric so made was then cut into proper sizes, and each piece fitted upon a bottle, to give it the proper size and shape, and then the sides or ends of the fabric were sewn together by hand. Each of the articles was then placed upon a model of a bottle, or mandril, and one end *169] fastened and tied so as to give *the form of the top of the bottle, and so complete the case or envelope.

On the part of the defendant, it was submitted that there was no evidence of infringement, that the invention described was not properly the subject-matter of a patent, and that the specification was larger than the title of the patent.

For the plaintiffs it was insisted that the invention was well described, and that the specification corresponded with the title, and that the using a material part of the plaintiffs' combination, viz. the mandril, the application of which to the making of the articles in question was new, was an infringement.

The learned judge nonsuited the plaintiffs, with leave to move.

Bovill, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the plaintiffs, with 40*s.* damages, "on the ground that the specification was not larger than the grant in the patent, and corresponded with it, and that the facts showed an infringement of the patent; or for a new trial, for misdirection, in directing a nonsuit to be entered, and in not leaving the question of infringement to the jury."

M. Chambers, Q. C., and *Raymond*, showed cause.—The title of the patent is, for "Improvements in the manufacture of cases or envelopes for covering bottles." The specification claims the combination of mechanism therein described, and the making of envelopes for bottles as described. The question is, whether that does not go beyond the title,—whether an improvement of the article embraces the invention of the mechanism whereby the improvement is achieved. [COCKBURN, C. J.—Do you not improve the manufacture, when you improve the machinery by which you manufacture?] *Taking the whole of [*170 the specification together, it clearly exceeds both the title of the letters patent and the provisional specification. Then, was there any infringement? No doubt the taking a material part of an invention which consists of a new combination, may be an infringement: *Lister v. Leather*, in error, 27 Law J., Q. B. 295. But the question here is, has the defendant taken a material part of a thing which the plaintiffs have invented. The only part of the plaintiffs' apparatus common to both processes, is, the mould or mandril. That clearly is not new. Its application to a variety of manufactures has for many years been notoriously common. [COCKBURN, C. J.—It is open to you to contend that the mandril is no part of the mechanism, but merely the thing upon which the mechanism acts.] Suppose we used a bottle, could it be said that that was an infringement?

Bovill, Q. C., *Lush*, Q. C., and *Clark*, in support of the rule.—The specification sufficiently corresponds with the title of the invention. The title is for "Improvements in the manufacture of cases or envelopes for covering bottles." It is not for the thing made, but for the making. [COCKBURN, C. J.—The claim is for the mechanism whereby the envelopes are made. WILLIAMS, J.—It is for the process.] That is, for the process coupled with the machinery. There is no question as to the novelty: the only point reserved, is, as to the infringement. Now, it was proved beyond question at the trial that the mechanism was new, and that the article produced was both new and useful. The defendant produces substantially the same result, by taking a part, a material part, of the plaintiffs' invention, viz. the mandril or model. If he had taken a real bottle with a cork in it, it would equally have been an infringement: *De la Rue v. Dickinson*, 3 Jurist *N. S. 841. [*171 That the mandril was a material part of the invention, in clear; envelopes could not be made without, for any available commercial purpose. [WILLES, J.—The thing produced was proved to be new; but the part infringed was not new.] It was new in its application, and in its modus operandi. In *Haworth v. Hardcastle*, 1 N. C. 182 (E. C. L. R. vol. 27), 4 M. & Scott, 720 (E. C. L. R. vol. 30), in case for invading the plaintiff's patent right to certain machinery for drying calicoes, &c., where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state

that it might be taken up again by the same machinery; a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the court refused to set aside the verdict for the plaintiff and enter a nonsuit. In *Crane v. Price*, 4 M. & G. 580 (E. C. L. R. vol. 43), 5 Scott N. R. 338, and numerous other cases, it has been held that a machine which will produce a better and cheaper article, may be the subject of a patent.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

We are of opinion that this rule ought to be discharged.

The plaintiffs' specification clearly shows that the patent is not for bottle envelopes, but for a mode of making them. Accordingly, it describes such mode as an apparatus for holding and fixing rushes or other like materials upon a bottle or the model of a bottle, and for turning up the ends and fastening them together, so as to form a case or envelope, which can be put on a bottle so as to protect it from injury, and removed, and again used for a similar purpose, until worn out.

*172] *In the plaintiffs' method, the rushes or other materials are separate when put into the apparatus, and are kept together by a suture or band applied near the lower part in the course of the process.

The defendant also makes bottle envelopes out of a material similar to that used by the plaintiffs, chiefly straw, but which is woven together with threads before being operated upon,—the straws forming the weft and the threads the warp,—so as to constitute a woven fabric. The fabric so made is cut into proper sizes, and each of the pieces is fitted upon a bottle, to give it the proper size and cylindrical shape, and the sides or ends are sewn together by hand. Each of them is then placed upon a model of a bottle, or mandril, and one end fastened and tied so as to give the form of the top of the bottle, and so complete the case or envelope.

The defendant's method resembles the plaintiffs' in the product, which is not the subject of the patent, and in one other material particular only, viz., the use of the model or mandril: and the question is, whether such use constitutes an infringement of the plaintiffs' patent.

The fact that the model or mandril constitutes part only of the plaintiffs' process, does not of itself affect the question. The infringement of any part of a patent process is actionable, if that part is of itself new and useful, so as that it might be the subject-matter of a patent, and is used by the infringer to effect the object or part of the object proposed by the patentee.

The question, therefore, is, whether the plaintiffs could have taken out a patent simply for applying a model or mandril in the form of a bottle, or indeed a bottle itself, in making envelopes for bottles. We are of opinion that he could not.

The use of a model or mandril for producing given forms of pliable *173] materials, was admitted at the trial, *and, indeed, without such admission, is well known to have been for ages common and usual in various arts. Such use was part of common knowledge, and a model or mandril for purposes similar to that of this patent, an ordinary and well-known tool. It is merely in respect of the sort of material to which it is applied, and the form of the utensil produced by it, that the plaintiffs' application of the model possesses any novelty.

The application of a well-known tool to work previously untried materials, or to produce new forms, is not in our opinion the subject-matter of a patent. The observations of the court in giving judgment in the recent case of *Tetley v. Easton*, 2 C. B. N. S. 706 (E. C. L. R. vol. 89), sustain this proposition. Indeed, to hold the contrary, might tend to produce oppressive monopolies in the application of old and well-known implements to new materials, without any further novelty or merit than the discovery of the material, or the form into which it is to be worked. Such a discovery is not, in our opinion, one of a new "manufacture" within the statute of James; and a patent for it alone cannot be maintained.

The rule to enter a verdict for the plaintiffs must, therefore, be discharged.

Rule discharged.(a)

(a) In the course of the following term *Borill* asked for leave to appeal. He observed, that, if the plaintiffs, treating the question as one of law, appealed without leave of the court, it was possible they might be met by the court of error saying that there was some scintilla of evidence. But

COCKBURN, C. J., said: I think we ought not to give you leave to appeal, when you admit that we properly dealt with the question as one purely of law, and so disposed of it. I think it would be going too far to give the plaintiffs any facility. We must leave them to their legal rights.

***THE MARQUIS OF SALISBURY v. THE GREAT
NORTHERN RAILWAY COMPANY. Nov. 19. [*174**

The Great Northern Railway Company, in 1848, purchased of the plaintiff certain freehold land adjoining a turnpike-road to be used partly for the site of their railway and works, and partly for the purpose of diverting a portion of an existing road. Having made a substituted road, the company, with the knowledge of the plaintiff and of the trustees, enclosed and took possession of the portion of the old road which had ceased by the diversion to form part of the turnpike-road. The soil of the road was not noticed in the conveyance, all parties being under the impression that it was vested in the trustees.

By several acts regulating the turnpike-road, the trustees had power from time to time to purchase land for the widening of the road: but there was no evidence that the freehold of the diverted portion of the road had ever been acquired by them:—

Held, that the presumption that the soil of the road was in the plaintiff as owner of the adjoining land, was not rebutted by the local turnpike acts, so as to cast upon the plaintiff the onus of showing that the soil of the road had not been purchased by the trustees.

Held, also, that the soil of the old road did not pass by the conveyance to the company; and that there was nothing in the General Turnpike Act, 3 G. 4, c. 126, or in the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, to place the company in the position of trustees of the substituted road, so as to transfer to them the soil of the old road.

Held, also, that the absence of objection on the part of the plaintiff and his agents when the company took and continued in possession of the land in question, did not amount to such a consent on his part as to preclude him from re-entering, by force of the 124th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18.

Seemle, that the true effect of the 124th section of the 8 & 9 Vict. c. 18, is not to prevent a claimant from bringing ejectment to establish his title, but merely to authorize the court to stay execution upon the judgment, when obtained.

A portion of the land thus taken by the company was purchased by them from one Pryor. It formed part of a larger plot which was originally waste ground of the manor of H. (of which the plaintiff was lord), lying at the side of the road, but which some years before 1848 had been enclosed and was held as copyhold of the manor. In 1848 it was so held by Pryor, who conveyed it to the company under the powers of the Lands Clauses Consolidation Act, 1845, and subsequently by deed in June, 1856, the plaintiff enfranchised the land so conveyed to the company by Pryor, to hold the same to and to the use of the company:—Held, that, assuming the plaintiff to have power so to grant, the right to the soil of the road did not thereby vest in Pryor.

THIS was an action of ejectment. By the writ the plaintiff claimed to be entitled to possession of a piece of land near the Wrestlers' Inn, in the parish of Bishop's Hatfield, in the county of Hertford, formerly the site of the old North Road, and commencing at a point nearly opposite the said inn, and extending thence, on the side of the present road, and between it and the Great Northern Railway, to a point where it falls into the said railway, and which piece of land contains by estimation sixteen perches.

The defendants appeared and defended for the whole of the land mentioned in the writ.

*175] *The cause came on to be heard before Pollock, C. B., at the last Summer Assizes for Surrey, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case:—

The Marquis of Salisbury, the plaintiff, is lord of the manor of Hatfield, within the boundaries of which all the lands hereinafter mentioned are situate, and is owner of all the wastes of the manor.

In the year 1846, the Great Northern Railway Company, the defendants, obtained an act of parliament intituled "The Great Northern Railway Act, 1846" (9 & 10 Vict. c. lxxi.), empowering them to make and maintain a railway according to certain plans and sections deposited as therein mentioned. In 1847, they obtained another act intituled "The Great Northern Railway Deviation between London and Grant-ham Act, 1847" (10 & 11 Vict. c. cclxxxvii.), empowering them to make certain deviations: and the part of their said railway to which this case refers is part of such deviations constructed under the powers of the last-mentioned act. The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), are incorporated with and form part of the said acts.

The plans, sections, and schedules hereinafter mentioned accompanied this case, and were to be referred to as part of it.

The plan or map marked A. and the section marked B. were copies of a portion of the deposited plans and sections of the defendants for the parish of Hatfield, through which the railway was to pass, and the schedule marked C. was a copy of part of the book of reference to and accompanying the said plan and section, and contained by reference to the figures on the said plan and section the names of the owners or *176] reputed owners, lessees or reputed lessees, and occupiers *of the lands in or through which the said alterations and deviations were intended to be made in the said parish; which said plan, section, and book of reference had been duly deposited, amongst others, with the clerks of the peace for the counties of Middlesex and Hertford, and were part of the plans, sections, and books of reference mentioned in the said act of 1847. The fields or pieces of land numbered respectively 75 and 79 on the plan, were at this time the freehold property of the plaintiff: the part numbered 47 was the turnpike-road hereinafter particularly mentioned.

The defendants requiring portions of the land numbered 75 and 79 on the deposited plans as above mentioned, purchased and took these portions, as well as other lands of the plaintiff, under the powers of their act. The conveyance from the plaintiff to the defendants of the lands so purchased, bears date the 19th of October, 1848. After reciting that

the said plans and sections showing the said proposed alterations in the line of the said railway, and also the said book of reference to the said plans containing as aforesaid the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of the lands in or through which the said alterations and deviations were intended to be made, had been deposited as aforesaid, the parcels conveyed are thus described: "All those the pieces or parcels of land and hereditaments particularly described in the first and second schedules hereunto annexed, and all mines and other minerals under, and all timber and other trees, and all rights, easements, and privileges whatsoever belonging or in anywise appertaining to the said pieces or parcels of land and hereditaments, or any of them, or any part thereof."

In the said first schedule to the said conveyance are *described [*177 (among others) the pieces or parcels of land following:—

No. on plan hereto and also on company's deposited plans.	Parish.	County.	Lessee.	Occupier.	Quantity.
75	Hatfield.	Hertford.		Harriet Webb.	a. r. p. 2 3 0
79	"	"		Same.	1 2 26

Annexed to the conveyance was a plan as mentioned as aforesaid in the said schedule of which the plan marked D. was a copy.

The defendants required the lands so purchased, not only for their railway and works, but also for the purpose of diverting a part of a certain turnpike-road, being part of the said old North Road. They accordingly constructed their railway in the line shown in the plan marked E.; and, under the powers vested in them by s. 16 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), diverted the said part of the said turnpike-road into the position shown on the same plan, carrying the diverted part of the turnpike-road over the railway by a bridge. The effect of this diversion was that some portion of the site of the said part of the said turnpike-road in its old position ceased to form part of the turnpike-road and was stopped up by the defendants, and was discontinued as a public highway. Part of the portion so stopped up is occupied by the defendants' railway; the rest, which adjoins the railway, is the land now claimed by the plaintiff, and is coloured blue, and is marked A. B. C. D. in the plan marked E. Vide post, p. 92.

The said plan marked E. is a plan of this part of the railway and of the adjoining lands after the construction of the railway and the diversion of the road. It shows the land occupied by the railway itself and the course of the turnpike-road as diverted. It also shows, *on the [*178 west side of the railway, and between it and the new part of the turnpike-road, three pieces of land,—one marked A. B. C. D., coloured blue, is a part of the site of the old turnpike-road not occupied by the present turnpike-road as already mentioned, and is the land claimed by the plaintiff, and the possession of which is defended by the defendants, in the present action,—another, marked C. D. E. F., and coloured yellow, is part of the land purchased from Mr. Pryor, and afterwards enfranchised by the plaintiff as hereinafter more fully mentioned,—the

remainder, marked E. F. G. H., and coloured pink, is part of the land conveyed by the plaintiff to the defendants, as above mentioned.

The land beyond the piece A. B. C. D., which is coloured green, is and has been since long before the conveyance to the defendants of the land marked pink, the freehold property of the plaintiff.

The pieces of land coloured yellow, were part of a larger plot which was originally waste ground of the manor of Hatfield, lying at the side of the road, and within the boundary of the manor, but which some years before 1848 had been enclosed, and was held as copyhold of the manor. In the year 1848, it was so held by Mr. Pryor, who conveyed it to the defendants under the powers of the Lands Clauses Consolidation Act, 1845; and subsequently, by deed dated the 18th of June, 1856, the plaintiff enfranchised the land so conveyed by Mr. Pryor, to hold the same to and to the use of the defendants.

The defendants purchased the land for the new road of and from the plaintiff, with the exception of a small part thereof coloured yellow on the plan E., which they purchased from the said Mr. Pryor: and, at the time they diverted the said part of the old road, and made the new road, they intended that such new road and the soil and freehold thereof *179] should be given and *taken by way of substitution of and in exchange for the soil and freehold of the said part of the said old road, and believed that the same would and did vest in them by reason of such substitution and exchange, and took and retained possession of the said part of the said old road accordingly for the purposes of their said railway and works.

The defendants so diverted the old road as aforesaid between the 26th of July and the 2d of August, 1849, and at the same time entered upon and took possession of the said piece of land in question for the purposes of their railway and works, and enclosed the same with a post and rail fence, and have continued in such possession and occupation of the same from thence hitherto; and they so entered and took possession, and have continued in such possession and occupation, with the knowledge of the plaintiff and his agents, and of the trustees of the old road; and the plaintiff never to the knowledge of the defendants objected in any way to the continuance of the said possession and occupation of the defendants until July, 1856, when for the first time to the knowledge of the defendants the plaintiff asserted a right to the possession of the said piece of land. The defendants so entered, took possession of, and occupied the said piece of land, believing that they had a right to such possession and occupation, and that the said piece of land, as part of the soil of the said old road, had vested in them by virtue of their said diversion of the said old road, and substitution of the said new road, and of their notices, and book of reference and plans accompanying the same.

The said piece of land, which is within the limits of deviation, is about three hundred yards from the Northern point of the station buildings of the defendants' railway at Hatfield; the sidings of which station long *180] before the claim of the plaintiff extended and still *extend by the side of and beyond the said piece of land. The said piece of land is not used by the defendants for any of the purposes of the railway, but was used by them for the purposes of the construction of the railway, and is permanently required for the enlargement of such

sidings, and for the purposes of the defendants' said railway and works; and, if the same of right belongs to the plaintiff (which the defendants dispute), they are and will be ready and willing to purchase the same from the plaintiff and pay him compensation for the same, and also to pay to him full compensation for the mesne profits or interest, according to the true intent and meaning of the Lands Clauses Consolidation Act, 1845, whenever the right thereto shall have been finally established by law in favour of the plaintiff, according to the true intent and meaning of the same act.

The part of the road so diverted is part of the turnpike-road described in the following local acts of parliament as the road leading from the place called Galley Corner, adjoining to Enfield Chase, in the parish of South Mims, in the county of Middlesex, and Lemsford Mill in the county of Hertford (being nearly nine miles in length); and by an act passed in the 3 G. 2 (c. 10), for repairing the said road, after reciting that the said road, by reason of many heavy carriages frequently passing through the same, was become very ruinous and dangerous to travellers, especially in the winter season, and that the ordinary course appointed by the laws and statutes of this realm for the repairs of the highways of this kingdom was not sufficient for the speedy and effectual amending the said road without some other provisions were made for that purpose, it was enacted, that, for the better surveying, ordering, repairing, and keeping in repair the road aforesaid, certain persons therein mentioned should be and were *thereby nominated and appointed trustees [*181 for putting that act in execution; and they, or any five or more of them, or such person or persons as they or any five or more of them should authorize and appoint, should and might erect or cause to be erected a gate or gates, turnpike or turnpikes, and also a toll-house or toll-houses in cross [sic] or on any part or parts of the said road, and should receive and take the tolls and duties therein mentioned; and that the money so to be raised and collected should be vested in the said trustees, and the same and every part thereof should be paid, applied, disposed of, or assigned to and for the several uses, intents, and purposes, and in such manner as is in the said act mentioned and declared (the reasonable charges expended or to be expended in obtaining that act of parliament and erecting the several turnpikes and toll-houses necessary for collecting the tolls or duties thereby directed to be paid being first deducted); and that it should and might be lawful to and for the surveyor or surveyors of the said turnpike-road, by an order under the hands of the said trustees, or under the hands of any five or more of them, to make or cause to be made causeways, and to cut and make drains through, and to erect arches and bridges of brick, timber, or stone upon, and also to widen any of the narrow parts of the said road by opening, clearing, and laying into the same the grounds of any person or persons lying contiguous thereto (not being a house, park, garden, orchard, planted walk or walks, or avenue to a house), and also to cause ditches or trenches to be made in such manner as the said surveyor or surveyors in their respective places should adjudge necessary, making such reasonable satisfaction to the owner or occupier of such ground which should be laid in to the said road, or through which any such drains should be cut, or in which any such arch or arches, bridge or

*182] bridges, or causeways, should *be made as aforesaid, for the damage which should or might be sustained thereby, as should be assessed and adjudged by the justices of the peace or the major part of them at the next general quarter sessions to be holden for the county wherein the ground so laid into the said road should lie, or through which any such drain or drains, ditch or ditches, should be cut, or on which any such arch or arches, bridge or bridges, or causeways should be made or erected as aforesaid, in case of any difference concerning the same; and that the toll or duty thereby granted and made payable should take place and have continuance only from and after the 1st of June then next for and during the term of twenty-one years. And by another act of parliament made and passed in the 17 G. 2 (c. 14), the first-mentioned act (except such clauses, matters, and things as are thereby altered or varied) was continued for a further term of twenty-one years, and additional trustees were appointed: and it was enacted that the right, interest, and property of all and every the turnpikes erected or to be erected by virtue of either of the said acts, should be vested in the said trustees appointed or to be appointed or elected to put the said acts in execution; and they, or any five or more of them, at their public meeting assembled, were thereby authorized and empowered as they should think proper to dispose of the same, and to bring actions, &c.

And by an act the 10 G. 3, c. 71, the said acts, and all the tolls or duties, powers, penalties, forfeitures, exemptions, articles, rules, clauses, matters, and things therein contained (except such as were thereby altered and varied), were continued in force for the further period of twenty-one years.

And, by an act of 18 G. 3 (c. 90), after reciting, that, by reason of
*183] the great expense the said trustees *had been at in widening the said road, and in purchasing messuages and lands for that purpose, particularly in the town of Hatfield, in the said county of Hertford, where the road was so narrow as to make it difficult and dangerous for two carriages to pass, and, from the great consumption of ballast by reason of the many heavy carriages passing and repassing thereon, the said road could not be effectually repaired and kept in repair, and the money then due and owing on the credit of the said tolls be repaid, unless the said tolls were increased and the term of the said acts further continued, it was enacted that the said several acts should be and were continued for a further term of twenty-one years.

By an act of the 49 G. 3, c. xxxiv., after referring to the said acts, it was recited as follows,—“And whereas there is now due and owing upon the credit of the tolls granted by the said acts a considerable sum of money, which, together with the tolls collected, have been duly applied according to the directions of the said acts; but the said road cannot be widened and improved and made completely convenient for travellers passing the same, and be effectually repaired and kept in repair, and the money now due and owing on the credit of the said tolls be repaid, unless the said tolls are increased and the term of the said acts further continued, and the powers thereof altered and enlarged.” And it was enacted that the said several recited acts, and all and every the clauses, authorities, powers, penalties, forfeitures, and punishments therein contained (except such as relate to exemption from stamp-duties, and except

such as were thereby altered, varied, or repealed), should be and continue in full force and effect, and, together with this present act, should be put in execution for the several purposes hereby and thereby intended, for and during the term thereafter *mentioned, as fully and effectually in all respects and to all intents and purposes whatsoever as if the same were expressly repeated and re-enacted in the body of the act now in recital; which said term thereby granted should be and was thereby declared to be subject and liable to the payment of all moneys then due and owing on the credit of the said recited acts, or which should or might thereafter be borrowed or become due on the credit of the said recited acts and this act, and all interest due and to become due for the same respectively. And it was further enacted that it should be lawful for the said trustees, or any five or more of them, at any meeting (if they should think proper), to order and cause to be built upon any parts of the said road as to them should seem most eligible and expedient, a crane, machine, or engine, with suitable buildings thereto, proper for the weighing of carts, wagons, or carriages conveying any goods, wares, or merchandise whatsoever; and that it should be lawful for the said trustees to let and demise, either with or without the tolls, the weighing cranes, machines, and engines which might be erected by virtue of the said act of the 13 G. 3; (a) and that, if any money should be agreed or awarded to be paid for any lands, tenements, or hereditaments, purchased, taken, or used by virtue of the powers of the said recited acts and this act, for the purposes thereof, should belong to any corporation, feme covert, infant, lunatic, or person or persons under any other disability or incapacity, such money should, in case the same should amount to the sum of 200*l.*, with all convenient speed be paid into the Bank of England in the name and with the privity of the accountant-general of the High Court of Chancery, to be placed to his account, "Ex parte the trustees for executing the said recited acts and this act," to the intent that such money should be applied under the *direction and with the approbation of the said court, to be signified by an order made upon a petition to be preferred in a summary way by the person or persons who would have been entitled to the rents and profits of the said lands, tenements, or hereditaments, in the purchase of the land-tax, or discharge of any debt or debts, or such other encumbrance, or part thereof, as the said court should authorize to be paid, affecting the same lands, tenements, or hereditaments, or affecting other lands, tenements, or hereditaments standing settled therewith to the same or the like uses, intents, or purposes; or, where such money should not be so applied, then the same should be laid out and invested, under the like direction and approbation of the said court, in the purchase of other lands, tenements, or hereditaments, which should be conveyed and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner, as the lands, tenements, and hereditaments which should be so purchased, taken, or used as aforesaid, stood settled or limited, or such of them as at the time of making such conveyance and settlement should be existing, undetermined, and capable of taking effect; and, in the meantime and until such purchase should be made, the said money should, by order of the Court of Chancery, upon application thereto, be invested by the said accountant-general in his name in the purchase of 3*l.* per Centum Consolidated or

3*l.* per Centum Reduced Bank Annuities; and, in the meantime and until the said Bank Annuities should be ordered by the said court to be sold for the purposes aforesaid, the dividends and annual produce of the said Consolidated or Reduced Bank Annuities should from time to time be paid by order of the said court to the person or persons who would for the time being have been entitled to the rents and profits of the

*186] *lands, tenements, and hereditaments so thereby directed to be purchased, in case such purchase or settlement were made; and that, if any money so agreed or awarded to be paid for any lands, tenements, or hereditaments purchased, taken, or used for the purposes aforesaid, and belonging to any corporation, or to any person or persons under any disability or incapacity as aforesaid, should be less than the sum of 20*l.*, and should amount to the sum of 20*l.*, then and in all such cases the same should, at the option of the person or persons for the time being entitled to the rents and profits of the lands, tenements, or hereditaments so purchased, taken, or used, or of his, her, or their guardian or guardians, committee or committees, in case of infancy or lunacy, to be signified in writing under their respective hands, be paid into the bank in the name and with the privity of the said accountant-general of the High Court of Chancery, and be placed to his account as aforesaid, in order to be applied in manner thereinbefore directed, or otherwise the same should be paid, at the like option, to two trustees to be nominated by the person or persons making such option, and approved of by five or more of the said trustees (such nomination and approbation to be signified in writing under the hands of the nominating and approving parties), in order that such principal money and the dividends arising thereon might be applied in any manner thereinbefore directed, so far as the case was applicable, without obtaining or being required to obtain the direction and approbation of the Court of Chancery; and that, where such money so agreed or awarded to be paid as next before mentioned should be less than 20*l.*, then and in such cases the same should be applied to the use of the person or persons who would for the time being have been entitled to the rents and profits of the lands, tenements, or

*187] *hereditaments so purchased, taken, or used for the purposes of the said recited acts and this act, and in such manner as the said trustees should think fit, or, in case of infancy or lunacy, then to his, her, or their guardian or guardians, committee or committees, to and for the use and benefit of such person or persons so entitled respectively; and that, in case the person or persons to whom any sum or sums of money should be awarded for the purchase of any lands, tenements, or hereditaments to be purchased by virtue of the said recited acts and this act, should refuse to accept the same, or should not be able to make a good title to the premises to the satisfaction of the said trustees or any five or more of them, or in case such person or persons to whom such sum or sums of money should be so awarded as aforesaid could not be found, or if the person or persons entitled to such lands, tenements, or hereditaments were not known or discovered, then and in every such case it should and might be lawful to and for the said trustees, or any five or more of them, to order the said sum or sums of money so awarded as aforesaid to be paid into the Bank of England in the name and with the privity of the accountant-general of the Court of Chancery, to be

placed to his account to the credit of the parties interested in the said lands, tenements, or hereditaments (describing them), subject to the order, control, and disposition of the said Court of Chancery, which said Court of Chancery, on the application of any person or persons making claim to such sum or sums of money, or any part thereof, by motion or petition, should be and was thereby empowered, in a summary way of proceeding, or otherwise as to the same court should seem meet, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the respective estate or estates, title, or *interest of the [*188 person or persons making claim thereunto, and to make such other order in the premises as to the said court should seem just and reasonable; and the cashier or cashiers of the Bank of England who should receive such sum or sums of money, were thereby required to give a receipt or receipts for such sum or sums of money, mentioning and specifying for what and for whose use the same was received, to such person or persons as should pay any such sum or sums of money into the bank as aforesaid; and that, where any question should arise touching the title of any person to any money to be paid into the Bank of England in the name and with the privity of the accountant-general of the Court of Chancery in pursuance of this act, for the purchase of any lands, tenements, or hereditaments, or of any estate, right, or interest in any lands, tenements, or hereditaments to be purchased in pursuance of the said recited acts and this act, or to any Bank Annuities to be purchased with such money, or the dividends or interest of any such Bank Annuities, the person or persons who should have been in possession of such lands, tenements, or hereditaments at the time of such purchase, and all persons claiming under such person or persons, or under the possession of such person or persons, should be deemed and taken to have been lawfully entitled to such lands, tenements, or hereditaments according to such possession, until the contrary should be shown to the satisfaction of the said Court of Chancery, and the dividends or interest of the Bank Annuities to be purchased with such money, and also the capital of such Bank Annuities, should be paid, applied, and disposed of accordingly, unless it should be made appear to the said court that such possession was a wrongful possession, and that some other person or persons was or were lawfully entitled to such lands, tenements, [*189 or *hereditaments, or to some estate or interest therein; and that, where, by reason of any disability or incapacity of the person or persons or the corporation entitled to any lands, tenements, or hereditaments to be purchased under the authority of the said recited acts and this act, the purchase-money for the same should be required to be paid into the Court of Chancery, and to be applied in the purchase of other lands, tenements, or hereditaments to be settled to the like uses in pursuance of the said recited acts and this act, it should and might be lawful to and for the said Court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of the said recited acts and this act, or so much of such expenses as the said court should deem reasonable, to be paid by the said trustees, or any five or more of them, out of the moneys to be received by virtue of the said recited acts and this act, who should from time to time pay such sums of money for such purposes as the said court should direct.

And it was further enacted that the terms granted by the said recited acts should upon the 20th of October, 1809, cease and determine; and that the said acts (subject to the alterations in this act mentioned) and this act should from thenceforth continue and be in force and be executed for and during the term of twenty-one years, and from thence to the end of the next session of parliament.

And by an act of the 1 W. 4, c. lx., after referring to the said acts, and reciting that it was expedient that the term and powers of the said acts should be enlarged, some additional powers granted, and the tolls granted by the said acts increased; and that it would facilitate the execution of the objects before mentioned if the said acts were repealed, and if other powers and provisions were granted and made instead *190] thereof, and were embodied in one act, and reciting that an act was passed in the 5th year of his late Majesty King George the 4th, intituled "an act for enabling justices of the peace for ridings, divisions, or sokes, to act as trustees for repairing and amending turnpike-roads," it was enacted that the said recited acts should be and the same were thereby declared to be repealed: and it was further enacted that the act now in recital should be put in execution for and during the term thereafter mentioned for the purpose of repairing and maintaining in repair the said turnpike-road, and that the said recited act passed in the 5th year of the reign of his late Majesty King George the 4th, and all and every the powers and provisions therein contained (except so far as they are repealed or altered by this act), should be as valid and effectual for carrying this act into execution as if they had been repeated and re-enacted in the body of this act; and that all his Majesty's justices of the peace in and for the counties of Middlesex and Hertford, with certain persons therein named, and their successors, being duly qualified according to the provisions and directions of the several acts for regulating turnpike-roads in England, should be and they were thereby appointed trustees for carrying into execution this act: and that it should be lawful for the said trustees to continue all and every or any of the toll-gates, toll-bars, and toll-houses, and weighing-machines then standing and being upon the said turnpike-road, or upon the sides thereof, and also to erect or build in lieu thereof, or in addition thereto, upon the said road, or any part thereof, or upon the sides thereof, or any part thereof, when and where and as they shall judge proper, any toll-gates or toll-bars, toll-houses, and weighing-machines, with out-houses and conveniences thereto, and to take in and *191] enclose suitable garden spots for such toll-houses *not exceeding one-eighth part of a statute acre each, as they should judge proper, and from time to time to alter or to take down and rebuild, or to discontinue and remove the same, or any of them, as they the said trustees should think proper; and that the last-mentioned act should continue in force for the term of thirty-one years.

The said Marquis of Salisbury, being afterwards desirous of altering the course of another part of the said turnpike-road, which other part passed through land of the said marquis, and which said proposed deviation or substituted part of the said road was also intended to pass through and over other land of the said marquis, he the said marquis promoted the passing of another act of parliament in the 9th year of the reign of Her present Majesty Queen Victoria for enabling the

trustees of the Enfield Chase Road to make the said last-mentioned deviation or alteration of the said turnpike-road, being a deviation or alteration of the said turnpike-road other and different from the said deviation or alteration so made by the defendants; by which last-mentioned act, after the authorizing of the last-mentioned deviation and alteration, and after reciting that part of the said road would, after the making of the said deviation or alteration, become unnecessary or useless to the public, it was enacted that such part should cease to be under the control of the said trustees, and should be stopped up and discontinued as a public highway, and should thenceforth vest in the said marquis, the owner of the adjoining lands, his heirs and assigns for ever; and that the freehold and inheritance of any lands to be purchased by the said trustees for the purposes of the same deviation of the said road, in case the same should be of freehold tenure, and, in case the same should be of any other tenure, the estate and interest therein, should not (notwithstanding any provisions in any of the acts in force for regulating *turnpike-roads in England), by means of [*192 any such purchase or any conveyances or assurances made in pursuance thereof, be vested in the said trustees, but such freehold and inheritance, or the estate and interest in such lands, should, notwithstanding such purchase and conveyance or assurance, remain and be vested in the persons in whom the same was invested immediately prior to such purchase by the said trustees, and the said trustees should, by means of such purchase and conveyance or assurance, be entitled to a perpetual right of way in, over, or upon the lands so purchased by them; and if at any time any land purchased by the said trustees under the authority of that act should not be wanted for the purposes thereof, and the road for which the same was purchased should cease to be a highway, then the right of way in or upon the said lands should cease and be extinguished, and the freehold and inheritance, and the said lands in case the same should be of freehold tenure, and the estate and interest in such lands in case the same should be of any other tenure, should be and remain in the persons then entitled to the same, freed and discharged from such right of way.

The court was to have the power to draw all inferences of fact.

The plaintiff contended that he was entitled to the possession of the piece of land coloured blue in the plan marked E., and before the diversion of the road he was owner of the soil, subject to the easement in favour of the public, and that the effect of the diversion was only to extinguish this easement.

The defendants contended,—first, that the soil of the part of the road in question was not vested in the plaintiff,—secondly, that, if vested, the whole or some part thereof passed to the defendants by virtue of their purchase,—thirdly, that if not previously *vested [*193 in the defendants by their purchase, yet it became vested in them by reason of the deviation and substitution mentioned in the case,—fourthly, that, if the defendants were mistaken as to their right to the land, still the plaintiff was not entitled to the possession thereof, the defendants being ready and willing to pay for the same whenever the plaintiff's title thereto should have been established.

Lush, Q. C. (with whom were *Manisty*, Q. C., and *H. Lloyd*), for

the plaintiff.(a)—The local acts set out in the case converted the road in question, which was an old parish road, into a turnpike-road. [BYLES, J.—In general, turnpike acts have no effect upon the ownership of the soil.] None whatever.

*194] *1. The first point relied upon by the defendants, is, that the soil of the part of the turnpike-road in question was not vested in the plaintiff. Now, the case states that he is the owner of the freehold on both sides of the road. The presumption of law, therefore, is, that he is the owner of the soil of the road. Besides, he is lord of the manor, and as such owner of the wastes lying on the sides of the road. The case discloses acts of ownership exercised over the spot by the plaintiff prior to the year 1848. As lord of the manor he granted a strip of land to the side of this very road to one Pryor, to hold of him as lord of the manor; and the defendants, having acquired Pryor's title, take an enfranchisement from the plaintiff. Unless, therefore, the railway act, or some other act of parliament, or some deed, has divested the soil and freehold of the spot in question out of the plaintiff, he has it still.

2. The next ground of objection is, that, if the land in question ever was vested in the plaintiff, the whole, or some part thereof, passed to and vested in the defendant by virtue of the conveyance to them by the plaintiff. The description of the parcels in the deed, as well as in the schedule and plans, which are referred to, the numbers, and the measurement, all concur in excluding the road in question, which is treated as a totally distinct thing. Indeed, it is manifest that the deed did not contemplate any dealing with the soil of the road, both parties evidently assuming that it was vested in the trustees under the local turnpike acts. Besides, this not being the case of a voluntary bargain, but a compulsory sale under the powers of a railway act, no presumption arises in favour of the purchasers. [CROWDER, J.—If this had been an ordinary conveyance of two pieces of land intersected by a road, do you deny that it would pass the soil of the road?] By such *195] *language as is found in this deed, it is submitted that it would not pass: and, further, it is submitted that the court will be more slow to draw inferences in favour of parties taking land compulsorily, than they would be in an ordinary case of purchase and sale. As to a portion of the road, it may be said that it passed by the grant to Pryor. It is plain, however, that the plaintiff, as lord of the manor,

(a) The points marked for argument on the part of the plaintiff, were,—

"1. That at the time of the commencement of this action, he was entitled to the possession of the land claimed, and is now entitled to recover possession thereof:

"2. That, before the diversion of the road, the soil and freehold of this piece of land (subject to the easement in favour of the public) was vested in him either as owner of the adjoining land on both sides or as lord of the manor:

"3. That no part of this piece of land was conveyed to the defendants by the plaintiff, or passed to the defendants by virtue of their purchase-deed of the 19th of October, 1848:

"4. That the effect of the diversion of the said road was merely to extinguish the easement to which the public were entitled over this piece of land:

"5. That the plaintiff is not, by his knowledge of certain proceedings of the defendants, as stated in the case, deprived of his right to the possession of the said piece of land:

"6 That this action of ejectment is rightly brought by the plaintiff in order to his finally establishing his right to the said piece of land, and that he is entitled to the judgment of the court, whatever may be the rights of the defendants under the Lands Clauses Consolidation Act, 1845, or otherwise."

had no intention by that grant to deal with any portion of his rights in the soil of the road.

3. Then, it is said, that, assuming that the old road was not vested in the defendants by their purchase, it became vested in them by reason of the deviation and substitution of the turnpike-road mentioned in the special case. That question turns upon the effect which is to be given to the provisions of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. The 16th section of that act empowers the company, subject to the provisions and restrictions in that and the special act, and any act incorporated therewith, for the purpose of constructing the railway, amongst other things, to divert or alter as well temporarily as permanently, the course of any roads, &c., or raise or sink the level of any such roads, &c., in order the more conveniently to carry the same over or under or by the side of the railway, as they might think proper. The 53d section enacts, that, "if, in the exercise of the powers by this or the special act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage-road, horse-road, train-road, or railway, either public or private, so as to render it impassable for, or dangerous, or extraordinarily inconvenient to, passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense *maintain such substituted road [*196 in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be." The 54th section imposes a penalty on the company if they omit to cause another sufficient road to be made before they interfere with any such existing road. The 55th section enables persons sustaining any special damage from the interruption of a road to maintain an action. And then comes the 56th section, which enacts, that, "if the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and, if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the (a) new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored, by writing under their hands, consent to an extension of the period, and in such case within such extended period; that is to say, if the road be a turnpike-road, within six months, and, if the road be not a turnpike-road, within twelve months." Nothing is there said as to the soil of the old road being vested in the company. The very existence of the provisions which will be relied on in the turnpike acts affords an argument against the company. The material provisions of the

(a) In the quarto and octavo editions of the statutes, "a" is inserted here. But, in the folio (which is a fac simile of the thing which now stands for the parliament roll), the definite article is used.

General Turnpike Act, 3 G. 4, c. 126, which bear upon this question *197] are the 83d, *86th, and 88th sections. The 83d section enacts "that it shall be lawful for the trustees or commissioners of every turnpike-road, and they are hereby fully authorized and empowered, from time to time, to make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management, or of any part or parts thereof, and to divert, shorten, vary, alter, and improve the course or path of any of the said several and respective roads through or over any commons or waste grounds or uncultivated lands, without making satisfaction for the same, and also through or over any private lands, tenements, or hereditaments, tendering and making satisfaction to the owners thereof and persons interested therein for the damage they shall sustain thereby; and it shall and may be lawful for the said trustees or commissioners, and for their surveyor or surveyors and workmen, with or without carriages or cattle, from time to time to enter upon any such commons or waste grounds, or uncultivated lands, private lands, tenements, or hereditaments as aforesaid through or over which the said road, or the widenings and alterations thereof, pass or are intended to pass, and to stake out and make the same in such manner as the said trustees or commissioners shall think necessary or proper, without being thereby subject or liable to be deemed a trespasser or trespassers, or to any fine, penalty, or forfeiture for entering or continuing upon any part or parts of such lands, tenements, and hereditaments respectively for any of the purposes aforesaid." The 84th section enables the trustees or commissioners of any turnpike-road to contract for the purchase of lands, &c., for widening, diverting, altering, and improving the road. The 85th provides for the mode of ascertaining the value of lands required for those purposes, where persons interested neglect or *198] *refuse to treat. The 86th section enacts "that every sum of money or recompense to be agreed for or assessed as aforesaid, shall be paid out of any moneys in the hands of the said trustees or commissioners, or out of the tolls granted by the act for making and repairing such turnpike-road, or out of the moneys to be borrowed on the credit thereof, to the party or parties or person or persons entitled thereto, or to their agents, or into the Bank of England, in manner by this act directed (as the case may be); and, upon such payment to such parties or persons, or their agents, or into the Bank of England, and after thirty days' notice thereof given to such parties or persons, or to their agents, or left at their respective usual places of abode, or with the tenant or tenants in possession of such lands, tenements, hereditaments, and premises, then such lands, tenements, hereditaments, and premises respectively shall be vested in such trustees or commissioners, and shall and may be taken and used for the purposes of such act: and such lands, and the site of such lands, tenements, hereditaments, and premises, shall be laid into and made part of the road, in such manner as the said trustees or commissioners shall direct, and shall be repaired and kept in repair by such trustees or commissioners, by the same ways and means as any other part of the road under their management is or ought to be kept in repair; and all parties and persons whomsoever shall be divested of all right and title to such lands, tenements, and hereditaments; and, after such new road shall be completed, the lands

or grounds constituting any former roads or road, or so much and such part or parts thereof as in the judgment of the said trustees or commissioners may thereby become necessary, or [sic] shall and may be stopped up and discontinued as public highways (unless leading over some moor, heath, common, uncultivated land, or waste ground, or *to some church, mill, village, town, or place, lands or tene- [*199] ments, to which such new road or roads doth not or do not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals), and shall be vested in and shall and may be sold and conveyed by the said trustees or commissioners, in the manner herein mentioned, for the best price that can be gotten for the same, and the money arising by such sale shall be applied for the purposes of the act for repairing and maintaining such turnpike-road," &c. And the 88th section enacts, "that, when any turnpike-road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to all the provisions and regulations in any act of parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose lands adjoin thereto, as hereinafter mentioned with regard to pieces of ground not wanted [s. 89]; but, if such old road shall lead to any lands, house, or place which cannot, in the opinion of the said trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorized to order and lay out if they find it necessary, then and in such case the old road shall be sold, but subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect; and the money arising from such sale in either of the said cases shall be applied towards the purchase of the land where such new road shall be made, or in the same manner as the *tolls arising on such road, as the trustees or [*200] commissioners thereof shall think fit; and, upon the completion of any contract whereby any part of the old road shall be given in payment for the value of the ground taken for the new road, or upon payment of the price of any part of the old road, the soil of such old road shall become vested in the purchaser thereof and his heirs; but all mines, minerals, and fossils lying under the same shall continue the property of the person or persons who would from time to time have been entitled to the same if such old road had continued." [COCKBURN, C. J.—It seems clear from these provisions, that, if *the trustees of the turnpike-road* had diverted this road, the Marquis of Salisbury's right to the soil of the piece which ceased to be part of the road would be gone.] It is for the benefit of the public that this extraordinary power is vested in the trustees. Here, the proceeding is for the benefit of the company. [WILLIAMS, J.—The legislature in framing highway and turnpike acts seem to have had no very accurate notion of the rights of the owners of the soil.] The trustees may make the lord of the manor buy his own land. No equivalent powers are given under the railway acts: the companies are compelled to buy even wastes or heaths. There

are no words vesting the soil of the old road in the company: and the rights of the owner of the soil cannot be divested without express words.

4. The next question raised is founded upon the 124th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, which, "with respect to interests in lands which have by mistake been omitted to be purchased," enacts, that, "if, at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special act, or any act incorporated therewith, they *201] were authorized to purchase, and which shall be permanently *required for the purposes of the special act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands, which the promoters of the undertaking shall through mistake or inadvertence have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in undisturbed possession of such lands, provided within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or, in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters of the undertaking thereon and the time of the payment of such purchase-money or compensation by the promoters of the undertaking, so far as such mesne profits or interest may be recoverable in law or equity; and such purchase-money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit." It is unnecessary to inquire whether this is a case within that section or not: *202] it is enough to say that it affords no answer to an action of ejectment. The right of the claimant is disputed by the company. His right must be legally established before that section can come into operation. [WILLIAMS, J.—If that were not so, the company would be enabled to fight the question at the expense of the claimant.] The point came before this court in *Doe d. Hyde v. The Mayor, &c., of Manchester*, 12 C. B. 474 (E. C. L. R. vol. 74), (a) where the court refused to set aside the writ of habere facias possessionem, but stayed the execution. This objection is probably based upon the case of *Doe d. Armistead v. The North Staffordshire Railway Company*, 16 Q. B. 526 (E. C. L. R. vol. 81). That, however, was a case where the company had given a regular notice to the landowner of their intention to take the land, making the deposit and giving the bond as required by the 8 & 9 Vict. c. 18, s. 85, which gave them a perfect right to enter and take possession of the land. Pattenon, J., in giving the judgment of the

(a) In equity, 5 De Gex & Smale 249.

court, says: "The compulsory clause, s. 85, was acted upon within the three years, and the land rightfully entered upon and taken. The company had exercised their compulsory power under it completely, so far as they were concerned; and, so far as they had need of any such power, the thing was done and finished on their part; for, it is to be observed, that the words of the 123d section are in the disjunctive, 'for the compulsory purchase *or* taking;' the ascertaining the amount of compensation after the lands were entered upon and used, and indeed taken, is no exercise of a compulsory power on the part of the company." It is the duty of the owner of the land to take steps to get the amount of compensation assessed. There is therefore no analogy between that case and the present.

**G. R. Clarke, contra.*(a)—1. Under the local turnpike acts it is clear that the piece of land in question vested in the trustees. [*203 They were by the 3 G. 2, c. 10, empowered to "widen any of the narrow parts of the said road, by opening, clearing, and laying into the same the grounds of any person or persons lying contiguous thereto," making reasonable satisfaction to such person or persons. By the 17 G. 2, c. 14, and 10 G. 3, *c. 71, the turnpikes and tolls are vested in them. The 18 G. 3, c. 90, which continues the former acts, and enlarges [*204 the powers thereof, describes the road in question as being so narrow as to make it difficult and dangerous for two carriages to pass." The 49 G. 3, c. xxxiv., treats the trustees as being the *purchasers* of lands, and makes various provisions for the application of the purchase-money where disabilities intervene.(b) And by the 9 Vict. c. xii,—an act promoted by the plaintiff for the purpose of stopping up a portion of this highway,—it is by s. 8 provided that the portion so stopped up "shall cease to be under the control of the said trustees," and "shall thenceforth vest in the Marquis of Salisbury, the owner of the adjoining lands, his heirs and assigns, for ever," subject to a proviso as to certain rights of way.(c) If the argument on the part of the plaintiff be well founded,

(a) The points marked for argument on the part of the defendants, were,—

"1. That the soil of the part of the turnpike-road in question was not vested in the plaintiff:

"2. That, if ever vested, the whole or some part thereof passed to and vested in the defendants by virtue of their purchase of land from the plaintiff:

"3. That, if not previously vested in the defendants by their purchase, yet it became vested in them by reason of the deviation and substitution of the turnpike-road mentioned in the special case:

"4. That the facts proved and stated in the special case show that the defendants entered upon and took possession of the land in question within the limits of deviation according to their compulsory powers, and it is a reasonable inference from the facts stated that they did so with the consent of the plaintiff, and that consequently, even if the soil was vested in the plaintiff, he can only now require the purchase thereof to be completed according to the provisions of the defendants' special act and the general acts incorporated therewith, and cannot take back the land, but can only claim compensation:

"5. That, if the defendants are mistaken in supposing that the land in question vested in them by any of the aforesaid causes, and the court should not consider that it is a reasonable inference from the facts that the plaintiff gave such consent as aforesaid to the defendants' so taking possession of the land, yet still the plaintiff is not entitled to the possession of the land, inasmuch as the defendants are ready and willing, and have expressed their readiness and willingness, to pay for the same according to the provisions of the said acts, whenever the title of the plaintiff thereto shall have been established."

(b) All these acts are repealed by the 1 W. 4, c. 1x.

(c) See the 11th section, which enacts, "that the freehold and inheritance of any lands to be purchased by the said trustees for the purposes of the deviation of the said road hereby

viz. that the plaintiff, as owner of the adjoining land, was already *205] entitled to the soil of the road, that provision was *idle. Further, the case states that the conveyance went upon the foundation of the deposited plan, section, and book of reference. In these numbers 75 and 79 are described as being the property of the Marquis of Salisbury: but, as to No. 47, the piece of land in question, the trustees are said to be the "owners or reputed owners." That is *prima facie* evidence against the plaintiff, that he is not the owner of No. 47. He is estopped by his own act from disputing what he has thus admitted.

2. The piece of land in question passed by the conveyance. The deed describes the parcels as consisting of two pieces of land numbered respectively 75 and 79, through which the road in question passes. Under such circumstances, the road itself clearly passes by the conveyance, though no mention is made of it, there being nothing to rebut the ordinary presumption of law "that waste land on the sides, and the soil to the middle of a highway belongs to the owner of the adjoining land:" Per Bayley, J., in *Doe d. Pring v. Pearsey*, 7 B. & C. 304 (E. C. L. R. vol. 14), 9 D. & R. 908 (E. C. L. R. vol. 22): and this presumption holds good, whether he be a freeholder, leaseholder, or copyholder.

3. Assuming that the soil of this road did not pass to the company by the conveyance, nor vest in the trustees under the local acts, it clearly vested in the company under the General Turnpike Act, 3 G. 4, c. 126, coupled with the provisions of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. The argument on the part of the plaintiff does not deal with the clause upon the authority of which the case finds that the road was diverted by the company, viz. the 16th section, which alone gives power to them to divert the course of a turnpike-road. No provision is there made as to what is to be done with the old road: nor *206] is there anything in that act to make the new part of the *turnpike-road subject to the same trusts as the old road. But the provisions of the General Turnpike Act are to be taken in conjunction with it; and all the rights which were before in the trustees are now vested in the company, who by virtue of the substitution become either owners or trustees of the old road. In *Allnutt v. Pott*, 1 B. & Ad. 302 (E. C. L. R. vol. 20), trustees under a turnpike act agreed with the plaintiffs to exchange with them a portion of old road for land required to form part of a new one, pursuant to the 3 G. 4, c. 126, s. 86. The new road having been formed, and an order having been made for stopping up the old one as unnecessary, the trustees by the same order gave up the portion of the old road to the plaintiffs according to agreement: and it was held that the public had acquired a complete right in the new road, and the plaintiffs in the land given in exchange, though no conveyance had been executed on either side. The clause in s. 84 of the act

authorized, in case the same shall be of freehold tenure, and, in case the same shall be of any other tenure, the estate and interest therein, shall not (notwithstanding any provisions in any of the acts in force for regulating turnpike-roads in England) by means of any such purchase, or any assurance or conveyance made in pursuance thereof, be vested in the said trustees; but such freehold and inheritance, or the estate and interest in such lands, shall, notwithstanding such purchase and conveyance or assurance, remain and be vested in the persons in whom the same was vested immediately prior to such purchase by the said trustees; and the said trustees shall by means of such purchase and conveyance or assurance, be entitled to a perpetual right of way in, over, or upon the lands so purchased by them."

directing a conveyance to the trustees where lands are purchased by them, does not apply where the vendors are persons *sui juris*, and acting in their own right. The cases of *Doe d. Armistead v. The North Staffordshire Railway Company*, 16 Q. B. 526 (E. C. L. R. vol. 71), and *The Marquis of Salisbury v. The Great Northern Railway Company*, 17 Q. B. 840 (E. C. L. R. vol. 79), show that the company here could not be treated as trespassers. In the course of the argument in the last case, Lord Campbell, addressing the plaintiff's counsel, said: "You allow, that, if the company had entered, the contract would have been complete."

4. The 124th section of the 8 & 9 Vict. c. 18, expressly provides that the company shall not be disturbed or molested in their possession of lands taken under circumstances like these. In *Doe d. Hyde v. The Mayor, &c., of Manchester*, 12 C. B. 474 (E. C. L. R. vol. 74), the question was not raised. It is obviously contrary to the *spirit of the act to allow an ejectment to be maintained under such circumstances. [*207]

5. The defendants are at all events entitled to ask the court to infer from the facts stated in the special case that they were in possession with the license and consent of the plaintiff. In *Doe d. Foley v. Wilson*, 11 East 56, upon a question whether a jury might presume a license from the lord of a manor to an enclosure from the waste, Lord Ellenborough said: "Though a grant from the lord would not be presumed within twelve or thirteen years, yet the continual view of the steward acting under the same lord for that period, without objection, might be sufficient for the jury to presume a license." *Doe d. Beck v. Heakin*, 6 Ad. & E. 495 (E. C. L. R. vol. 33), 2 N. & P. 660, is an authority to the same effect. Here, the plaintiff sells the company a piece of land for the purpose of enabling them to divert the road; and he and his steward stand by and see the company putting up fences and dealing with the obsolete portion of the old road, assuming it rightfully to belong to them. It would be manifestly unjust to allow him now to say that their possession is wrongful. Suppose the position of the parties were reversed,—could the company be permitted to say that they had not become the purchasers of the land? [WILLIAMS, J.—We are all clearly of opinion that we cannot infer such a consent as is necessary to sustain your argument. Neither party knew at the time that the soil of the road was in the plaintiff.]

Lush was heard in reply.

WILLIAMS, J.—I am of opinion that our judgment must be for the plaintiff. A great variety of points have been made in the course of this discussion. 1. The first is, as to the title of the Marquis of Salisbury *to the piece of land in question. It appears to me to be impossible to doubt, that, *prima facie*, either in the character of [*208] owner of the adjacent soil on each side of the road, or as lord of the manor, the marquis was the owner of the soil of the road, unless there be some act of parliament which prevents the ordinary presumption of law from arising. It is insisted on the part of the defendants that that presumption is rebutted by the various local acts of parliament passed for the making, maintaining, repairing, and widening the Great North Road, which are referred to in the case, and to which our attention has been invited in the course of the argument: and it is contended, that,

looking at the general scope of those several acts of parliament, it is impossible to escape from the conviction that it was contemplated and intended by the legislature that the soil of the road should absolutely vest in the trustees; or that, at all events, it lies upon the marquis to show that the piece of land in question was not obtained by the trustees by purchase under the provisions of those acts. It seems to me, however, that there is nothing in this case to vary or control the law as it is laid down by Lord Kenyon in the case of *Davison v. Gill*, 1 East 69, where he says,—“As to the consent of the trustees of a turnpike-road, the soil was not vested in them, but remained in the persons who were entitled to it before the act passed by which they were appointed. The trustees have only the control of the highways.” The ordinary rule of law being that the owner of the adjacent soil is to continue in possession of his common law rights, and remain proprietor of the soil of the road usque ad medium filum viæ,—or, if possessed of the land on both sides, of the entire road,—the acts of parliament referred to not in any respect controlling that common law right, I think it cannot be said that it lies *209] upon the marquis to prove the negative, as is *suggested; but that he is entitled to stand upon the ordinary presumption of law arising from the character which he fills. Mr. *Clarke* further contends upon this point, that the Marquis of Salisbury cannot be said to be the owner of the adjacent soil on both sides of the road, as far as regards that portion next the land which the company bought of Mr. Pryor. But the answer to that is, that, assuming the right to the soil of the road to have been in the marquis before the grant to Pryor, the effect of that grant is not sufficient to take it out of him. It is not necessary to inquire whether in point of strict law it was competent to the marquis to make the grant. Whether he had the power or not, we must look to the intention,—did he or did he not intend to pass to the grantee any rights which he had in the soil of the road? When we find that the piece of land so granted was to be held of the lord as part of the copyhold of the manor, it seems to me to be impossible to say that it was intended to convey anything but the right to the very piece of land granted, the right to the soil of the adjoining road being left as it was. Upon this ground, therefore, I am of opinion that our decision upon the first point must be in favour of the plaintiff.

2. The second question is, whether the piece of land in question passed to the defendants by the terms of the conveyance of the 19th of October, 1848. It is not disputed by Mr. *Lush*, that, in the ordinary case, where a man who is the owner of two pieces of land conveys them to a purchaser, if a turnpike-road lies between them, the soil of the road passes by the conveyance, although the conveyance is silent as to its existence, and although the particular measurement of each piece is given, and would exclude the road. The argument on the part of the plaintiff, is, that there are particular circumstances in this case which *210] require a different *decision, and show that the road in question did not pass. I consider it to be perfectly clear that the road did not pass by the conveyance. Before the conveyance it is manifest that the company themselves thought that the soil of the road was in the trustees, and not in the plaintiff. The plans and book of reference required by the standing orders in parliament, and set out in the special case, are evidently framed upon that footing; and it seems to me that

the conveyance exactly carries out that view of the case. It mentions two pieces of land numbered respectively 75 and 79, and describes their exact contents, and makes no mention whatever of No. 47, either in the conveyance itself, or in the schedule or plan, which by reference are imported into it. Taking the whole together, therefore, it seems to me to be perfectly clear that the three pieces of land thus numbered and described are treated as distinct, and that the effect of the conveyance is to pass two of them only to the company.

3. The next point is, that, under the 8 & 9 Vict. c. 20, coupled with the provisions of the General Turnpike Act, 3 G. 4, c. 126, the effect of the diversion of the old road and the substitution of a new one, was to vest the old road in the defendants. Now, there has been considerable controversy in the course of the discussion, as to whether the power under which the defendants effected the diversion of the road is contained in the 16th or in the 56th section of the 8 & 9 Vict. c. 20. The inclination of my opinion is, that the power was conferred by the 56th section: but it appears to me to be unnecessary to decide that; for, if the power to divert and substitute were exercised under s. 16, I am unable to follow the argument of Mr. *Clarke*, which, as I understood it, was shortly this,—that the General Turnpike Act (by s. 4) makes that act applicable to all future acts that may be passed for the *purpose of making, repairing, widening, or *diverting* turnpike-roads; [*211 and that the statute in question,—the 8 & 9 Vict. c. 20,—is to be considered as one of them, and therefore is to be read in connection with the 3 G. 4, c. 126. I feel great difficulty in seeing how that argument can be sustained: but, if it could be sustained, it only comes to this, that the provisions of the General Turnpike Act, 3 G. 4, c. 126, are to be applied to the 8 & 9 Vict. c. 20, so far as they are applicable to it. Then the clauses which Mr. *Clarke* insists have the effect of transferring the soil of the old road to the trustees or commissioners, have reference to roads diverted by the trustees or commissioners under the powers of that act. The road in question has not been diverted by the trustees or commissioners. In the case of common highways, the law appears to be that the diversion of the old road does not take away the property in the soil from the proprietor. The first observation which arises upon this part of the argument, is, that it would be strange that the legislature should have provided for turnpike-roads, and made no provision as to common highways. I cannot, therefore, think that there is any provision in the act dealing with the question what is to become of the old turnpike-road when a new one has been substituted for it by a railway company. The act of parliament being silent upon the subject, the consequence appears to me to follow, that the right of the owner of the soil remains as it was,—discharged probably of the easement to which it was subject before the diversion. Upon the whole, therefore, I am of opinion that this point also must be decided in favour of the plaintiff.

4. The fourth question arises upon the 124th section of the 8 & 9 Vict. c. 20, the point which was last discussed by Mr. *Lush*. I cannot deny that the words of the act at first sight seem to be somewhat difficult to *reconcile with the notion that ejectionment will lie, because [*212 it enacts that the railway company are to remain in undisturbed possession, provided that, in case the title is disputed, they pay the

amount of certain costs within a given time. It would, therefore, at first sight, seem as if no action could be maintained against the company which would be inconsistent with their right to remain in possession. Upon the whole, however, I think the proper construction of this section is this,—that it does not mean that ejectment shall not be brought, but that the right shall be tried in an action of trespass, or by an issue, which would be an inconvenient thing in practice; but to authorize the court to interfere, as was done in *Doe d. Hyde v. The Mayor, &c., of Manchester*, 12 C. B. 474 (*E. C. L. R.* vol. 74), by restraining the execution, and thus giving the company the benefit of this provision in that way, after the right had been decided in the ordinary course by an action of ejectment.

5. The fifth point was founded upon the assumption that this court, as a matter of fact, would come to the conclusion that there had been the consent on the part of the marquis which has been suggested. We have already expressed our opinion upon that, saying that we do not think ourselves justified under the circumstances in implying such assent. That ground therefore also fails.

I have now, I think, gone through all the several points, and am of opinion that the plaintiff is entitled to our judgment upon all of them.

CROWDER, J.—I also am of opinion that our judgment should be in favour of the plaintiff. The facts are shortly these:—The plaintiff, being possessed of lands on each side of a turnpike-road, and being *213] also lord of the manor, in the year 1848 sold to the *defendants, a railway company, two pieces of land particularly set out and described in the conveyance thereof. After having taken possession of the land so sold to them, the company, having occasion to divert an old road, set out a new one, and took possession of the abandoned portion of the old road, and have continued in possession ever since, no complaint having been made on the part of the plaintiff or his agents until the year 1856. The plaintiff now by this action of ejectment seeks to recover that piece of road. It undoubtedly appears to be a case of some hardship, the plaintiff having stood by for so many years, and having seen the company take possession of the land and apply it to the purposes of their railway and works without any objection. All, however, that we can do, is, to decide the case according to law upon the various points which have been submitted to us: and, after the best consideration that I can bring to the case, I have come to the conclusion that my Brother Williams has arrived at, viz., that our judgment must be for the plaintiff.

1. The first point made on the part of the defendants, is, that the plaintiff never had a right to the piece of land in question. It is conceded that the plaintiff was owner of the freehold on both sides of the road, and also lord of the manor, and that *primâ facie* the presumption of law would be that he was also owner of the soil of the road: but it is said that the effect of that presumption is diminished, if not altogether rebutted, by the fact of the road having from time to time been widened under the provisions of the several local acts referred to in the case; and non constat, therefore, that some part at least might not have been purchased by the trustees for that purpose. I entirely agree with my Brother Williams, that, the presumption of law being that the ownership of the soil of the road is in the marquis as owner of the adjoining lands

on *both sides, it lay upon the defendants to show that it has been taken out of him. We must assume that the plaintiff's position as owner of the adjoining lands, and as lord of the manor, vested in him the soil of the road at the time of the conveyance in 1848. It is said, that, at all events, as to the portion of land bought by the company of Mr. Pryor, the plaintiff could only be entitled to the soil of one-half of the road. The answer to that, however, is clear. The case shows that that piece of land had been taken from one side of the road by the plaintiff, and granted by the plaintiff as copyhold of the manor to Mr. Pryor; distinctly showing that it was treated as part of the waste of the manor. It seems to me to be impossible to say that by that grant the plaintiff parted with his right to the soil of the road. I therefore think there is no pretence for saying that this portion of the road stands in any different position from the rest, so as to affect in any degree the right of the plaintiff thereto. [*214]

2. The second point is one upon which I have entertained some doubt. I was inclined for some time to hold in favour of the defendants, that the conveyance passed the road to them. If that had been clearly so upon the conveyance, whatever was the intention of the parties, effect must have been given to the language of the deed. As to the intention of the parties at the time, that is tolerably clear: the plaintiff did not conceive that he had any right to the soil of the road; he believed that to be in the trustees: and the defendants believed the same, for, in the book of reference accompanying the plans submitted to parliament, they state the trustees of the road to be the reputed owners of the piece numbered 47. The conveyance refers to and incorporates the schedule and plan, which give the numbers and contents of the parcels, specifying numbers 75 and 79 as the pieces of land intended *to be conveyed, and altogether omitting No. 47. It seems to be quite clear, therefore, that all that was intended to pass by the conveyance was the two pieces coloured red. Again, when we look at the language of the conveyance, we find that it is specifically applicable to Nos. 75 and 79, and refers to the book and to the deposited plan. It is clear, therefore, that the conveyance does not deal with the turnpike-road at all. [*215]

3. Then, assuming that the road in question did not pass by the conveyance, it is said that the defendants became entitled to it under the provisions of the General Turnpike Act, 3 G. 4, c. 126, and the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 20. The way in which Mr. *Clarke* puts it is this,—By the 16th section of the 8 & 9 Vict. c. 20, permission is given to the railway company to divert and alter turnpike-roads. Nothing is said in that act as to what is to be done with the ancient road; reference must, therefore, be had to the General Turnpike Act. Turning to the provisions of that act, we find, that, when the trustees of a turnpike-road, in the exercise of the powers conferred upon them, divert a road, the part that is stopped up vests in them, and they may sell it. Mr. *Clarke* contends that the railway company in this respect stand in the same situation as the trustees. There are great difficulties in the way of this argument. In the first place, I incline to adopt the view presented by Mr. *Lush*, that the 16th section gives only general powers to divert and alter, and that the 53d, 54th, 55th, and 56th sections point out what shall be done in case of

such diversion and alteration. It is worthy of notice, that, in these sections, the words are "raise, sink, or use," or "interfere with;" the word "divert" does not occur: but it is insisted that that must include diverting. I think those sections may fairly be held to be applicable

*216] to permanent as well as to temporary *obstructions of roads. Nothing is said as to what is to become of the old road, when a new one is substituted for it. But I think the true construction of the act is, that all that is to be done when a road is diverted or altered in the course of the formation of a railway, is to be found in the provisions above referred to. If that be so, then, as the act is altogether silent as to what is to be done with the old road when a new one is substituted, the result is that the easement before enjoyed by the public over it is taken away, and the right of the owner of the soil must prevail. Assuming the argument of Mr. *Clarke* to be well founded, to the extent that the power of the company to divert must be regulated by the provisions of the General Turnpike Act, the difficulty is, to make out that the railway company become trustees quoad the diverted portion. It is clear that all the provisions of that act have reference exclusively to diversions made by the trustees. Where they, in exercise of the powers conferred upon them, divert a road, the soil of the old road is in terms vested in them, and they have power to sell it. But I do not see any mode of coming to the conclusion that those provisions vest it in the railway company. This third point, therefore, I think, likewise fails.

4. The only remaining point is that which arises upon the 124th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, viz. that, the company having entered upon and taken possession of the land, they shall remain in the undisturbed possession of it, provided they shall purchase and pay for the same within a given time after the owner shall have established his title thereto. It is said that the maintenance of an action of ejectment is inconsistent with the company's remaining in undisturbed possession. But the plaintiff must establish his title: and, how is he to do this unless by an action of ejectment?

*217] An *action of trespass is not the legitimate course for establishing a title to land. That can only properly be done by an ejectment, which is quite a matter of right. The plaintiff's title being established, the company may remain in undisturbed possession, by means of a motion to stay execution. I therefore think this point also fails, and consequently that our judgment must be for the plaintiff.

5. The next point urged on the part of the defendants, is, that, upon the facts stated in the special case, it must be considered that the company took possession of the piece of road in question with the consent of the plaintiff; and, consequently, reference being had to the provisions of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, that the plaintiff is precluded from maintaining this action of ejectment. The answer to this was given by the court during the argument. The consent referred to there clearly means, the consent given by a seller to a purchaser, and not a consent to be implied from circumstances such as are stated in this special case, viz. that the plaintiff was cognisant of the company exercising acts of ownership over the land in question. The plaintiff at that time did not know that the land belonged to him. He, as well as the company, conceived that it belonged to the trustees of the

road. No such inference of consent, therefore, can be drawn from the non-interference of the plaintiff.

BYLES, J.—This case has been so fully discussed both at the Bar and by my two learned Brothers, that it is only necessary for me to add that I entirely agree with the reasons they have given for pronouncing judgment in favour of the plaintiff. Judgment for the plaintiff.

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*M'KUNE v. JOYNSON. May 22.

The master of a vessel on the eve of sailing gave one of the seamen an advance note in the following form,—“Ten days after the ship *Athlone* sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement the sum of 6*l.*, provided the said Reuben Hill shall sail in the said ship from the said port of Liverpool.”

The plaintiff, an outfitter, gave the seaman in exchange for the note 3*l.* 5*s.* in cash, and 2*l.* 15*s.* worth of wearing apparel; but he stated, in answer to a question from the court, that, if he had advanced the whole amount in cash, he would have charged a discount of 7½ per cent. The seaman having sailed with the vessel,—Held, by Cockburn, C. J., Williams, J., and Byles, J.,—dissentiente Willes, J.,—that the condition upon which the holder of the document was entitled to sue the maker was substantially fulfilled by giving the seaman the amount in money and money's worth.

THIS was an action brought in the Passage Court of Liverpool, upon the following document, commonly called an “advance-note,” signed by the defendant, a master mariner:—

“Agreement made at Liverpool this 10th day of March, 1857.

“Ten days after the ship ‘*Athlone*’ sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement the sum of 6*l.*, provided the said Reuben Hill shall sail in the said ship from the said port of Liverpool.

D. S. JOYNSON.

“Payable at Joseph Yeoward's, Water Street.”

The declaration, after setting out the agreement, stated that the defendant delivered the same to the said Reuben Hill therein named, that the plaintiff, relying upon the defendant's said promise, did advance 6*l.* to the said Reuben Hill on the said agreement, that the “*Athlone*” afterwards sailed from the said port of Liverpool, that Reuben Hill sailed in her, and that the said period of ten days from the sailing of the said ship had elapsed; and alleged for breach non-payment of the 6*l.*

The defendant pleaded that he did not promise nor did the plaintiff advance the money as alleged.

At the trial, it was admitted that the defendant signed the note, that the “*Athlone*” sailed from Liverpool, and that Reuben Hill sailed in her: and it was *agreed that all amendments necessary to raise [*219 the question between the parties should be made.

The plaintiff, who was a tailor and outfitter at Liverpool, was the only witness. He stated that the defendant was master of the ship “*Athlone*,” that Reuben Hill, who was engaged as carpenter on board that vessel, brought him the document above set out: and that he advanced him upon it 3*l.* 5*s.* in cash, and 2*l.* 15*s.* worth of wearing apparel. And, in reply to a question put by the learned judge, he said, that, if

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he had advanced the whole 6*l*. in cash, he would have charged Hill a discount of 7½ per cent.

On the part of the defendant, reference was made to the statutes 8 & 9 Vict. c. 116, s. 7, 13 & 14 Vict. c. 93, ss. 58, 59, 61, 17 & 18 Vict. c. 104, ss. 168, 169, and 17 & 18 Vict. c. 120, s. 4: and it was submitted that the memorandum in question was not an allotment-note according to the statute, and that, if it were, the plaintiff was not one of the persons described in s. 169; that the plaintiff was not entitled to recover either at common law or under the statute; that the condition was not strictly fulfilled; and that there was no privity between the plaintiff and the defendant. *Gerhard v. Bates*, 2 Ellis & B. 476 (E. C. L. R. vol. 75), was also referred to.

For the plaintiff, it was insisted that, upon proof of an advance of 6*l*. to the person named, the law would imply a promise on the part of the defendant to pay the 6*l*. to the person making the advance; and he likened the agreement in question to an advertisement offering a reward for the apprehension and conviction of a felon,—*England v. Davidson*, 11 Ad. & E. 856 (E. C. L. R. vol. 39), 3 P. & D. 594.

A verdict was taken for the defendant, and leave reserved to the plaintiff to move to enter a verdict for him for 6*l*., the court to draw such inferences as a jury might have drawn.

*220] *Brett*, accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiff for 6*l*., “on the ground that the plaintiff had complied with the condition on the performance of which the defendant had promised to pay whomsoever should perform it.” He submitted, that this document was not an allotment note within the 169th section of the 17 & 18 Vict. c. 104, but a document well known in sea-port towns, and amounted in effect to a conditional agreement with an uncertain person; and that it was enough if the condition was substantially fulfilled, by the sailor getting money or money’s worth to the extent of 6*l*.

John Gray showed cause.—This is a conditional contract. If the plaintiff had advanced 6*l*. in money to Reuben Hill, the defendant would clearly have had no answer to the action. Instead of money, the seaman gets a large portion of the amount in slops, which the plaintiff chooses to value at 2*l*. 15*s*.: and the plaintiff himself admits that he would not have made the entire advance in cash without deducting a most outrageously exorbitant discount,—7½ per cent. or 1*s*. 6*d*. in the pound upon a document which had only ten days to run.^(a) [*COCKBURN*, C. J.—Was the plaintiff, if he cashed the note, to run the risk of the seaman going on the voyage and lose the interest of his money too?] It may be: but that does not signify, if such was the condition: there is no contract between the plaintiff and the defendant until that condition has been fulfilled. [*COCKBURN*, C. J.—The consequence would be entirely to destroy the usefulness of these notes or agreements.] If the parties be not held strictly to the performance of the condition, there will be no limit to the deduction.

*221] **[BYLES*, J.—The man who takes the note may charge 50 per cent.] This deduction which the plaintiff admits he would have made if he had advanced the amount in cash, considerably exceeds 50 per cent. [*BYLES*, J.—By the transaction which took place here, the

(a) It did not appear how long before the sailing of the vessel the note passed.

seaman did not, it is true, get an advance of 6*l.* in cash, but he has got that amount in money and in money's worth. WILLES, J.—I cannot quite accede to that. The plaintiff,—who belongs to a class which has been considered odious since the time of Lord Hardwicke, as one which preys upon a proverbially reckless and improvident class of persons,—admits that his charge for the accommodation is 7½ per cent. COCKBURN, C. J.—Having his profit (a sufficient one no doubt) upon the clothes, he makes no charge for discount. I do not see what right we have to deal with anything but the evidence which appears upon the learned judge's notes.] Money's worth is not money. The natural inference would be that the plaintiff took care that the profit upon the clothes should cover the interest. [COCKBURN, C. J.—Is not the reasonable construction of the agreement this,—that whoever shall advance to the seaman 6*l.* in money or in money's worth shall be the person to whom the sum mentioned in the agreement shall be payable?] All difficulty might have been got over by making the instrument in the form of a promissory note payable to bearer. [WILLES, J.—Is there any case where the doctrine of equivalents has been applied otherwise than as between the immediate parties themselves? If this had been the ordinary case of a guarantee for an advance of money, would it have sufficed to deliver a horse, or so much less discount?] Clearly not. The condition upon which the defendant's liability is to attach must be strictly performed.

Brett, in support of his rule.—The question is, *whether the condition upon which the defendant's liability for the payment [*222 of the note was to arise has or has not been complied with by the plaintiff's advancing the amount to Reuben Hill partly in money and partly in clothes. The utility of these advance-notes is obvious. The master of a vessel on the point of sailing will not take upon himself the risk of advancing money on account of wages to men upon whom he could not depend for the performance of their contract, and whom he would be unable to find when their services were required. But persons of the plaintiff's class, who abound at the various ports, are content to make advances upon the credit of the master, to enable the men to procure those things which are essential to their comfort during the voyage, inasmuch as they know their haunts. The practice has been found to operate so beneficially that the legislature, in the recent Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, have omitted to make any provision in respect of them, although the former statutes did contain some. The argument on the part of the defendant would preclude the seaman from obtaining the discount of the note even upon the most reasonable terms. In *Gaskill v. Skene*, 14 Q. B. 664, 671 (E. C. L. R. vol. 68), Erle, J., says: "Every one knows from his own private experience, and we judicially learn in the course of the trials before us, that a larger debt may, by a customary trade allowance, or by deducting discount or otherwise, be discharged by the payment of a smaller sum, and that in common language the account would then be said to be paid." *Hart v. Nash*, 2 C. M. & R. 387,† 5 Tyrwh. 955, and *Williams v. Griffiths*, 2 C. M. & R. 45,† 5 Tyrwh. 748, show that a payment to take a case out of the statute of limitations, may be in what is equivalent to money, as well as in money itself. [WILLIAMS, J.—No doubt,

*223] where goods are agreed *to be taken as an equivalent for money, that is in point of law as well as of fact a payment.] In *Brown v. Byrne*, 3 Ellis & B. 703 (E. C. L. R. vol. 77), a bill of lading expressed that goods shipped at N. were deliverable at L., to order or assigns, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with 5 per cent. primage, and average accustomed." By the usual custom in the trade at L., three months' interest or discount is deducted from freights payable under bills of lading, on goods coming from certain ports, including N. The assignee of this bill of lading having received the goods, the shipowner claimed the freight without any deduction, contending that the custom was not binding in law, as contradicting the written contract. The assignee paid the freight less the discount: and, upon a case stating the above facts, the Court of Queen's Bench held the custom to be binding, and to control the bill of lading. Here, the captain, on settling with the seaman for his wages on the termination of the voyage, would deduct the 6*l.* as a payment: it clearly does not lie in his mouth to say that it was not an advance of 6*l.* to the sailor. Even if the court can see upon the evidence that there was any discount charged upon the advance,—which, it is submitted, they cannot,—it makes no difference.

COCKBURN, C. J.—I am of opinion that the rule should be made absolute to enter a verdict for the plaintiff. The action is brought upon a note or agreement made at Liverpool, whereby the defendant undertakes ten days after the ship "Athlone" sails from the port of Liverpool to pay to any person who should advance 6*l.* to Reuben Hill on that agreement the sum of 6*l.*, provided the said Reuben Hill should sail in the said ship from the port of Liverpool. It appears, that, upon the *224] faith of this contract, and upon the delivery to him *by Reuben Hill of this agreement, the plaintiff advanced to Reuben Hill 3*l.* 5*s.* in cash and 2*l.* 15*s.* worth of wearing apparel. Upon cross-examination, however, it appears that the plaintiff stated, that, if Reuben Hill had not bought clothes of him, but had simply asked him to cash the note for him, he would have charged him a discount of 7½ per cent., or 1*s.* 6*d.* in the pound. Now, in the first place, it is important to consider what was the real nature of the transaction between the plaintiff and Reuben Hill. It has been suggested in the course of the argument that the evidence leads to the conclusion, that, in the sum which the plaintiff charged Reuben Hill for the goods, he charged him not merely the price of the goods with a fair profit, but also the discount which he stated that he would have charged if he had given him cash in exchange for the note. I must confess that the evidence as reported to us leads my mind to exactly the opposite conclusion. It would seem that the plaintiff, in consideration of the profit he made on the sale of the goods, was satisfied to take the note in payment; but that, if the note had been brought to him simply for the purpose of being discounted, he would have charged 7½ per cent. It strikes me, upon the evidence, we must take the transaction to have been this,—the sailor, wanting some articles of clothing, comes to the plaintiff and buys of him articles to the amount of 2*l.* 15*s.*, and the plaintiff takes from him the note, giving him the balance (3*l.* 5*s.*) in cash, thus giving the man cash and goods to the full value of the note. The question is, whether that is a legitimate transaction within the scope of this agreement, so as to entitle the plain-

tiff to demand from the defendant the sum mentioned in it. Mr. *Gray* insists that the meaning of the agreement is, that the party seeking to enforce it must show an advance of the full amount in hard cash, and that the condition *upon which the liability of the defendant [*225 upon the note or agreement was to arise, was not performed either by a payment to the sailor in goods, or partly in goods and partly in money, or by a payment of the whole sum in money subject to a discount. It is unnecessary to consider the latter case, though I incline to think it is involved in what I am about to say; for, I am clearly of opinion, that, where, as here, payment has been accepted partly in cash and partly in an equivalent for cash, the transaction is valid, and the note or agreement enforceable against the donor. Notes of this kind have, as Mr. *Brett* has very truly observed, been in use for many years, and have been found in practice to be extremely useful. The object is that the sailor shall not receive an advance in cash before the sailing of the ship, which from the known improvident habits of mariners would inevitably be thrown away; but that he shall be enabled, by means of an instrument payable within a short period after the departure of the vessel, to procure articles which are essential to his comfort and well-being on the voyage.(a) But, if it be decided that the holder of the note cannot enforce it if any part of the amount is advanced in the shape of goods, the whole system of advance-notes which has been found to be practically so useful will at once be annihilated. I cannot think it ever was contemplated that any other construction should be put upon these documents than this,—that whatever amounts to an advance as between the sailor and the outfitter, shall be considered an advance as between the latter and the master. Here there was, as between the sailor and this plaintiff, an advance in money and money's *worth to the full amount of the note, and therefore I am of [*226 opinion that the plaintiff is entitled to recover upon it. Even in the case of discount, the sailor gets an equivalent for the money; for, in point of fact, the person who takes the note advances the money for it when he gives the amount less the value for the time it has to run. It is true that the sailor would not actually obtain an advance of 6*l.* in cash; but he would get an equivalent by anticipating the time of its receipt. Confining my judgment, however, to the particular circumstances of the case before us, I am of opinion that we are fairly entitled to put upon this document the construction I have stated: and I think we should be doing incalculable mischief if we were to put any other construction upon it. Doubtless these instruments may at times be used as a means of extortion. But sailors, like other men, must protect themselves in the best way they can. Upon the whole, I am of opinion, that, upon the true construction of this note, the condition on which the defendant's liability was to attach has been performed, and consequently that the plaintiff is entitled to recover.

I am authorized by my brother *Williams*, who has been obliged to go to *Chambers*, to say that he concurs in the view which I have endeavoured to present. I regret that we are not unanimous; for, I cannot

(a) It is difficult to perceive how this laudable object is attained by giving the man a document which he may immediately convert into cash by paying an exorbitant sum by way of discount to some crimp or sloop-seller.

help entertaining great distrust as to the propriety of my own opinion when I find it is opposed to that of my brother Willes.

WILLES, J.—I also must express my regret that I am unable to assent to the judgment which has just been pronounced by my Lord: but I feel bound to say that I entertain a very clear opinion to the contrary. I think it is assumed without any foundation that the transaction amounted *227] to full payment of the note as *between the plaintiff and Reuben Hill. There is no evidence whatever of that beyond the mere statement of the plaintiff that he paid Hill 3*l.* 5*s.* in money and 2*l.* 15*s.* in goods: the plaintiff does not even state that Hill accepted the goods in satisfaction of that sum. I think that was a question for the jury, and one deserving of grave consideration. It is said that power is reserved to us to draw such inferences as a jury might draw; and the learned counsel in support of the rule has told us that this course is warranted by the act of parliament which regulates the proceedings of the Passage Court of Liverpool. It may be so: but I protest, in the absence of the act, that I am not aware of any power by which the duty of trying such a question is cast upon us: and I think it one which is eminently fitted for the consideration of a jury. Here is a case where a tradesman upon his own showing obtains from a sailor most exorbitant interest, at least 40 or 50 per cent. (a) I must confess I cannot help thinking that the old prejudice against usury was founded upon sound sense and right feeling: and I think that all money dealings with a sailor should be regarded with the greatest possible watchfulness, and that a case in which such dealing is involved is one which ought not to have been withdrawn from the ordinary constitutional tribunal for the decision of questions of fact. If the matter had rested with me, I should have had no hesitation in discharging the rule, upon the ground that inferences of fact such as are to be drawn here are more proper for a jury,—and especially a Liverpool jury,—than for the court. I think incalculable mischief is likely to arise from our usurping or pretending to exercise a jurisdiction with which the law in *228] its *wisdom has not seen fit to invest us. But, assuming it to be satisfactorily made out that the sailor here took the clothes agreeing that as between him and the plaintiff they should represent the sum of 2*l.* 15*s.*, still I am of opinion that the condition upon the performance of which the plaintiff or any other person who should perform it was to become entitled to receive 6*l.* from the defendant, has not been performed. I have a particular objection to the doctrine of equivalents: and I object to all legislation which has a tendency to interfere with men's contracts. Our duty is to interpret and to enforce them only. The words of this contract are perfectly plain and intelligible,—“Ten days after the ship ‘Athlone’ sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement the sum of 6*l.*, provided the said Reuben Hill shall sail in the said ship from the said port of Liverpool.” Assume that the 6*l.* were advanced by the plaintiff to Reuben Hill partly in money and partly in clothes,—that the sailor, who had not the option of receiving the whole sum in money (for, the plaintiff himself states, that, if he had cashed the note, he would have deducted 1*s.* 6*d.* in the pound for discount), was content to receive 2*l.* 15*s.* of it in

(a) The evidence afforded no data for ascertaining the rate. It did not appear from the learned judge's notes when the note was given to the plaintiff, or when the ship sailed.

the shape of clothes,—the question is, whether that is a performance of the condition,—whether an advance of 2*l.* 15*s.* in goods is an advance of that amount of money. I must confess I should have thought not. Generally speaking, when a man undertakes to perform one thing, or is to become entitled to something upon the performance of a given condition, he does not satisfy the undertaking or the condition by the performance of a different thing. Thus, if a man were to contract to supply another with so many thousand bricks, or if a guarantee were given to a banker to secure an advance of 1000*l.*, and in the *one case, instead of bricks the party tendered hops, and in the other, [229 the banker, instead of money, hands over 1000*l.* worth of railway scrip, I have yet to learn that that would be a performance or an equivalent for the performance of the contract in the one case or of the condition in the other. Again, in the case of husband and wife, the law in general makes the husband responsible for necessaries supplied to the wife; but, suppose, instead of necessaries, money were advanced, I have yet to learn that the husband could be sued for that.(a) This shows that we cannot properly admit of equivalents. A party is bound by the contract into which he has entered, not by something which somebody may choose to say is equivalent to it, or even better. Assuming it to be equivalent or better, nobody has a right to substitute it. In the present case, I am not satisfied that it was an equivalent that was given. It may be that the master, knowing the rapacity of the persons with whom sailors usually deal, desired that the man should have 6*l.* in money with which he might go to the most advantageous market for the supply of his wants for the voyage. But, be that as it may, an advance in clothes, or partly in money and partly in clothes, is not in my judgment such an advance as was here contemplated. The possibility of its being equally convenient or advantageous to the sailor, will not alter the legal construction and effect of the document. It is perfectly obvious to my mind that a payment in goods under circumstances like these is not equivalent to an advance in money: and I think it is too much to suppose that the party giving this note was indifferent as to the mode in which the advance was made. I say nothing as to discount: nor do I see how the decision of this case is *to be governed by those cited. [230 In *Hart v. Nash*, 2 C. M. & R. 337,† 5 Tyrwh. 955, there was an express agreement that the hats should be given and received as part payment of the debt. And in *Brown v. Byrne*, 2 Ellis & B. 703, the deduction or discount was incorporated into the terms of the contract by the custom of the particular trade. These cases, therefore, can have nothing to do with the subject under consideration. Upon the plain, broad, and intelligible rule that a man is only bound by the terms of the contract into which he has entered, and not by any vague notion of attributive justice, I am of opinion that this rule ought to be discharged.

BYLES, J.—Notwithstanding the unfeigned respect which I at all times feel for the judgment of my learned Brother Willes, I am clearly of opinion that this rule should be made absolute. I think the word “advance” in this document does not necessarily or even *primâ facie* mean an advance in money only. The expression used is not “pay,” or “lend,” or “lend to me through Reuben Hill,” nor even “advance in

(a) See *Knox v. Bushell*, 3 C. B., N. S. 334 (E. C. L. R. vol. 91).

cash:" but it is simply "who shall advance to Reuben Hill on this agreement the sum of 6*l*." *Prima facie*, that seems to me to import such an advance as shall, as between the sailor and the man who deals with him, be an advance of 6*l*.; and therefore I think any advance to that amount, whether in money or in money's worth, is an advance within this contract. The document, being addressed to no person in particular, is addressed to all the world. It is addressed not to a banker, but to the class of persons who are in the habit of making advances upon these notes at Liverpool. If the advance is made by way of discount, the sailor must pay something for the use of the money for the time the *231] note has to run. Added to that, the man *who advances the money runs the risk of the sailor's not going on the voyage. It therefore seems to me to be a most unreasonable construction of this contract to hold that the person who takes the note must advance the whole 6*l*. in cash, and not a farthing less. If there be any ambiguity upon the face of it, according to the ordinary rule of construction, the words must be taken most strongly against the person whose engagement is under consideration. I am clearly of opinion, that, upon the true construction of this document, if 6*l*. be advanced either in money or in goods, or partly in money and partly in goods,—I do not say, if the note is accepted in discharge of an existing debt,—the person making the advance satisfies the condition upon which the liability of the maker of the instrument to repay the advance was to arise. I cannot agree with the severe construction which my Brother Willes puts upon the evidence; for, we have it upon the oath of the plaintiff, with nothing to contradict it, that he advanced Reuben Hill on that paper 3*l*. 5*s*. in cash and 2*l*. 15*s*. worth of wearing apparel, both of which Reuben Hill received.

WILLES, J.—With reference to the last observation of my Brother Byles, I may explain that what I meant to say was this,—that there was nothing in the evidence to show that the sailor agreed to take the clothes as intrinsically worth 2*l*. 15*s*. Rule absolute.

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*In re MARY EDEN. Nov. 24.

By a marriage settlement made in 1844, certain property of the intended wife was conveyed to trustees upon trust to permit the husband to receive the rents and profits during the coverture, or until the wife should by writing under her hand otherwise direct or appoint, and, from and after such direction or appointment, upon trust for the separate use of the wife. The deed also contained a power of sale, to be exercised "at the request and by the direction (in writing) of the husband and wife." The husband received the rents and profits down to the year 1851, when the wife exercised her power of appointment by directing the trustees to receive the rents, &c., and to apply them to her separate use. In 1852, the husband went to Australia:—Held, not a case for an order to dispense with the husband's concurrence in a deed for the conveyance of the property, under the 3 & 4 W. 4, c. 74, s. 91.

THIS was an application for an order under the 91st section of the 3 & 4 W. 4, c. 74, to enable Mary Eden to convey certain freehold property at Oxford, to which she was separately entitled, without the concurrence of John Eden, her husband.

The affidavits upon which the motion was founded disclosed the following facts:—The parties were married in 1844, when the property in

question was settled upon the following trust,—“from and after the solemnization of the said marriage, to permit the said John Eden and his assigns to receive the rents and profits of the said hereditaments during the coverture of himself and the said Mary Eden, or until the said Mary Eden should by any writing under her hand otherwise direct or appoint; and, from and immediately after such direction or appointment should be made, upon trust, during the remainder of the said coverture, for the separate use of the said Mary Eden; and, from and after the determination thereof, if the said Mary Eden should survive the said John Eden, upon trust for the heirs, executors, administrators, and assigns of the said Mary Eden; but, if the said John Eden should survive the said Mary Eden, upon trust for such person or persons, and generally in such manner as the said Mary Eden, notwithstanding her coverture, should by deed or will direct or appoint.” There was also a power of sale contained in the settlement, which was to be exercised by the trustees “*at the request and by the direction of the said John Eden and the said Mary Eden *during their joint lives*, such request and direction to be testified by some writing under the hands and seals of the said John Eden and the said Mary Eden.” [*233]

Down to the year 1851, the rents and profits were received by John Eden; but, in March in that year, Mary Eden, pursuant to the provision for that purpose in the settlement, required the trustees to receive them and to pay and apply them to her sole and separate use; and they had ever since been so received and applied by the trustees. In December, 1852, John Eden proceeded to Australia. No tidings of him had reached his wife since the 25th of December, 1857, when he was at Geelong. The affidavit of Mary Eden alleged her belief that he had no intention ever to return to this country.

No application had been made to the husband for his concurrence in the conveyance.

Phipson, for the applicant.—There is nothing in the 91st section of the statute which requires a preliminary application to the husband for his concurrence in the conveyance, though the practice of the court seems in general to require it: *In re Hester Murphy* (or *Ex parte Mirfin*), 5 Scott N. R. 166, 4 M. & G. 635 (E. C. L. R. vol. 43); *In re Sarah Woodcock*, 1 C. B. 437 (E. C. L. R. vol. 50); *In re Isabella Grierson Perrin*, 14 C. B. 420 (E. C. L. R. vol. 78); *Ex parte Anne Trenery*, 1 C. B. N. S. 187 (E. C. L. R. vol. 87). But, it seems, that that step has been dispensed with where the husband has gone out of the jurisdiction of the court under circumstances to warrant the belief that he never intends to return: *In re Anne Kelsey*, 16 C. B. 197 (E. C. L. R. vol. 81); *In re Yarnall*, 17 C. B. 189 (E. C. L. R. vol. 84). And here the wife swears that her husband has been in Australia since 1852, that she has not heard of him since the end of 1857, and that she believes he has no intention to return to this country. [COCKBURN, C. J.—Our power is confined to the ordinary case *of a wife's separate property. But here the power of alienation is fettered by a certain condition: it is to be exercised at the request and by the direction of the husband and wife.] The court will not inquire whether or not a good title can be conveyed. The words of the act are very general,—that, if a husband “shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being trans-

ported beyond the seas, *or from any other cause whatsoever*, it shall be lawful for the court, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband, in any case in which his concurrence is required by this act *or otherwise*." Here, the husband has no interest in the property either present or future, the wife having under the power contained in the deed made an appointment in favour of herself. [COCKBURN, C. J.—Does the act apply to all, where the deed expressly stipulates for the concurrence of both? The husband may have no *direct* interest in his wife's property: but, at the same time, he may not choose that she should alienate it so as to become a burthen to him. It would be a strong measure for us under such circumstances to give her authority to convey.] Suppose the husband, on being applied to, refuses to concur, as no doubt he will, what is to be the result? [WILLIAMS, J.—Why should the court be called upon to make an order to dispense with the husband's concurrence, where he has by express stipulation a control over the property? You are in effect asking us to alter the terms of the settlement.] The object of the act was to prevent the husband, in the cases provided for, from obstructing the sale of his wife's property. [COCKBURN, C. J.—That is in cases where the law renders his concurrence necessary to *235] enable her to do an *act* which is for her sole and separate benefit. Here, the husband's concurrence is required, not by mere operation of law, but it is matter of express stipulation and bargain. BYLES, J.—Are you prepared with any authority to meet the difficulty presented by my Lord? No. [BYLES, J.—Then, the order would do you no good.] The party is willing to take it *valeat quantum*.

COCKBURN, C. J.—I think we ought not to make an order which might induce a purchaser to take a bad title. Unless I could see my way to the conclusion that our order would supersede the necessity of the husband's concurrence, I am not disposed to accede to the application. If any authority can be found to warrant it, the motion may be renewed.

WILLIAMS, J.—This is an important question. Where a power is given which is to be exercised only on the joint request of the husband and wife, why should the court give the preference to the wife rather than to the husband?

The rest of the court concurring, *Phipson* took nothing.(a)

(a) The matter was not moved again.

*236] *HARMER v. CORNELIUS. *July 5.*

The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability.

When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.

THIS was an action against a master for wrongfully dismissing a workman.

The declaration stated, that, in consideration that the plaintiff would,

on or before the 20th of December, 1857, go to Manchester, and there enter the defendant's service in the capacity of painter, on the terms that he was to work from eight o'clock in the morning to six o'clock in the evening each day of his the plaintiff's engagement, and that the said defendant should retain him in his service in the capacity aforesaid for more than a month, and would pay him for his said services at the rate of 2*l.* 10*s.* per week during the continuance of such service, the defendant promised the plaintiff to perform and fulfil the said terms in all things on the defendant's part to be performed and fulfilled; that the plaintiff, confiding in the defendant's said promise, did, on or before the day aforesaid, go to Manchester aforesaid, and there enter into the defendant's service in the capacity aforesaid, on the day aforesaid, and on the terms aforesaid; and that, though the plaintiff had always been ready and willing to continue in the defendant's service in the capacity aforesaid, and on the terms aforesaid, whereof the defendant had notice, yet that the defendant did not nor would retain the plaintiff in his service for more than a month; but that, on the contrary thereof, before the expiration of the agreed month, and when the plaintiff was so ready and willing, and the defendant had such notice as aforesaid, he the defendant wrongfully discharged the plaintiff from his the defendant's said service, contrary to his said promise, and thence hitherto refused to retain the plaintiff in his the defendant's said service, for the remainder *of the said month; by means whereof the plaintiff had lost and [*237 been deprived of all the wages, profits, and advantages he would have acquired from the continuance of the service, &c.

The defendant pleaded several pleas, amongst others, secondly, that the plaintiff was not ready and willing, as alleged,—sixthly, that the defendant was induced to make the promise in the declaration mentioned by the false and fraudulent representation of the plaintiff that he was competent to perform the service for which he was engaged, whereas the plaintiff was quite incompetent to perform such service, wherefore the defendant, as soon as he discovered the said fraud and the plaintiff's incompetency, rescinded the contract, and discharged the plaintiff from his said service, without having derived any benefit or advantage therefrom. Issue thereon.

The cause was tried before Williams, J., at the first sitting at Westminster in Easter Term last, when the following facts appeared in evidence:—

In December, 1857, the defendant, who resided at Manchester, inserted an advertisement in the *Era* newspaper for “two first-rate panorama and scene painters.” The plaintiff sent the following reply,—

“Sir,—In answer to your advertisement in the *Era* newspaper, for two scene painters, I wish to subscribe my name and that of my friend Mr. Wallis to the list of candidates applying for the situation offered. Enclosed is a bill of a panorama we have lately painted. The salaries we should require would be not less than 2*l.* 10*s.* per week each; travelling expenses paid to and fro.”

To this the plaintiff received the following answer from the defendant's agent:—

“December 21st, 1857.

“Sir,—In answer to yours, Mr. Cornelius agrees to *pay you 2*l.* 10*s.* per week, but you must pay your own travelling expenses, [*238

and work from eight o'clock in the morning until six in the evening. In case you don't write by Wednesday, Mr. C. will engage with some one else. If it meets your views, you can come by the earliest train."

The plaintiff then wrote as follows,—

"Sir,—In reply to your letter, I beg to say that we will come down to Manchester on the terms specified in your letter, and pay our own travelling expenses, if you will engage us for one month certain; but it would not be worth our while to come down for a less period, unless you will pay our fares to Manchester and back."

The defendant's agent again wrote,—

"December 27th, 1857.

"Messrs. Harmer and Wallis,—In reply to yours, I am directed by Mr. Cornelius to inform you that you are engaged, and that the time will be more than a month: hours from eight o'clock in the morning to six o'clock in the evening, and all over-time made to be paid at the rate of 2*l.* 10*s.* per week. You must come immediately, or, should you not be here by Tuesday next, the 29th instant, Mr. Cornelius will engage other parties."

To this the plaintiff replied as follows,—

"Sir,—We received your letter, and beg to say we shall be in Manchester, on Tuesday evening. We cannot get away before that time, as we are engaged in painting a transparency for the Prussian ambassador; and we shall get it finished on Monday night."

The plaintiff and his friend accordingly went to Manchester, and were set to work at scene-painting. They were, however, found to be so incompetent, that, at the end of the second day, the defendant discharged them. For this dismissal, the plaintiff and Wallis each brought an action.

*239] *On the part of the defendant, it was submitted that he was entitled to a verdict upon the second and sixth issues, if the jury were satisfied that the plaintiff was incompetent to do the work for which he was engaged; and that the allegation of fraud was immaterial, for that, whether or not the plaintiff had been guilty of a fraudulent misrepresentation, the defendant was not bound to retain in his employ a workman who was wholly incompetent. It was further submitted that the plaintiff's evidence proved a joint contract with Wallis and himself, —upon which the learned judge said he would amend, if necessary.

The learned judge then asked the jury, whether the plaintiff had been dismissed, or whether he voluntarily left the defendant's employ,—whether the plaintiff was incompetent to perform that which he had been engaged to perform,—and whether he had fraudulently represented himself to be competent, knowing himself not to be so: and he told them, that, if the plaintiff did not think himself incompetent, there could be no fraud.

The jury found, that the plaintiff was dismissed, and that he was incompetent, but that there was no fraud on his part.

The learned judge reserved for the court the question whether incompetency alone was an answer to the action: it being agreed, that, if the court should be of opinion in the negative, a verdict should be entered for the plaintiff for 12*l.* 10*s.*

S. Temple, Q. C., accordingly, in Easter Term last, moved to enter a verdict for the defendant on the second and sixth issues, on the grounds

urged at the trial; but the court granted the rule only upon the ground that the finding of the jury entitled the defendant to a verdict on those two issues,—saying that the *contract was not a joint one with the plaintiff and Wallis, it being a contract to give a particular benefit to each. [*240]

Needham, on a subsequent day, showed cause.—No leave was reserved as to the second issue. [WILLES, J.—The affirmation of readiness and willingness imports competency. It is in truth the same question.] The fact found by the jury, viz. that the plaintiff was incompetent as a workman, might go in mitigation of damages, or might afford ground for a cross-action; but it clearly affords no substantive ground of defence. The real defence is, that the defendant was induced to enter into the contract by fraud. Now, where fraud is put forward as the substantial defence, the defendant is bound to try that question, and that only. Knowing that he had an answer to the allegation of fraud, the defendant went down to trial prepared to meet that charge,—a case which necessarily must depend upon the personal knowledge of the parties; whereas the question of competency would depend upon the testimony of witnesses by whom the plaintiff had been employed. [WILLIAMS, J.—I told the jury that it would be fraud in the sense in which the word is used in the sixth plea, if, knowing himself to be wholly incompetent, the plaintiff had represented himself to be competent. It is no argument to say that the defendant went down to try the question of fraud and nothing else. Pleadings almost always put in an allegation of fraud.] The allegation of fraud here is a substantive averment of fraud, and not put in as the mere jargon of the pleader. [WILLIAMS, J.—It is sufficient if so much of the plea is proved as affords a defence. At the most, your argument amounts to mere hardship.] The issue tendered is, whether the plaintiff was competent at the time of the representation; and the *finding is that he was incompetent at that time, not at the time the contract was to be performed. [WILLIAMS, J.—You say he [*241] might have learned his art between the time of the representation and the arrival of the time for the performance of the engagement! BYLES, J.—The substantial issue is, whether the plaintiff was competent at the time when it was material that he should be so.] At all events, want of competency affords no defence to an action of this sort: the absence of competency may go in mitigation of damages, or be ground for a cross-action; but it is no ground for putting an end to a special contract. In the case of a retainer of a skilled artist, the law, no doubt, implies that he shall bring a reasonable amount of skill to the performance of what he undertakes to do. The case of *Burgess v. Beaumont*, 8 Scott, N. R. 668, 7 M. & G. 962 (E. C. L. R. vol. 49), is an authority to show, that, where parties make a special contract for services, they must satisfy themselves beforehand of the character and capacity of the persons they contract with, and that, in the absence of fraud or an express warranty, they cannot rescind or abandon it. In *Keates v. The Earl of Cadogan*, 10 C. B. 591 (E. C. L. R. vol. 70), it was held that there is no implied duty in the owner of a house which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and that no action will lie against him for an omission to do so, in the absence of express warranty or active deceit. *Jervis, C. J.*, there said: "The declaration does not allege that the defendant made any

misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz., make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it." In *Cornfoot v. Fowke*, 6 M. & W. 358,† to assumpsit for the non-performance of an agreement to take *242] a ready-furnished *house, the defendant pleaded that the plaintiff caused and procured the defendant to enter into the agreement by means of fraud, covin, and misrepresentation of the plaintiff and others in collusion with him; on which issue was joined. It appeared at the trial that the plaintiff had employed one C. to let the house in question, and the defendant, being in treaty with C. for taking it, asked him "if there was any objection to the house," to which he answered that there was not, and the defendant entered into and signed the agreement; but he afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not: and it was held,—Lord Abinger, C. B., dissentiente,—that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that, as the representation was not embodied in the contract, the contract could not be affected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea. So, in *Sutton v. Temple*, 12 M. & W. 52,† it was held, that, on a demise of land, or the vesture of land (as, the eatage of a field) for a specific term, at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purposes for which it is taken. And in *Hart v. Windsor*, 12 M. & W. 68,† it is laid down that there is no implied warranty on a sale of a lease of a house or of land, that it is or shall be reasonably fit for habitation, occupation, or cultivation; and that there is no contract, still less a condition, implied by law, on the demise of real property only, that *243] *it is fit for the purpose for which it is let. And in *Ormerod v. Huth*, 14 M. & W. 651,† where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller,—it was held that an action on the case for a false and fraudulent representation was not maintainable, without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. All these cases proceed upon the principle, that, where there is a special contract, in the absence of fraud or express warranty, no term can be implied which is not to be found in the contract itself.

David Keane (with whom was *S. Temple*, Q. C.), in support of the rule.—The declaration alleges that the defendant retained the plaintiff in his service in the capacity of a painter, and that, though the plaintiff had always been ready and willing to continue in the defendant's service in the capacity aforesaid, whereof the defendant had notice, the defendant wrongfully discharged him. The averment of readiness and willingness involves capacity, and that is put in issue by the second

plea. The plaintiff could not be said to be ready and willing, if he was altogether incompetent to do the work for which he was retained. In *De Medina v. Norman*, 9 M. & W. 820,† it was held that an averment of the plaintiff's readiness and willingness to grant a lease was equivalent to an averment of his having a title to grant it. Parke, B., there says: "The meaning of a contract to demise, is, not only that a certain form of words shall be put on paper, but that the party assuming to demise shall have title to demise. The *lessee bargains for a [*244 good lease, and the lessor cannot maintain an action against him, unless he had power to make a lease. It is, therefore, essential to aver in such a case that the landlord had authority to make a good lease. But then the objection to this declaration must be considered as taken on general demurrer. That being so, it is substantially averred that the plaintiff had title to demise. The declaration states, for instance, that the plaintiff had performed all things on his part to be performed; and, if I mistake not, there is a case in Carthew's Reports(a) which decides that that averment would be sufficient for the present purpose. But, supposing that averment to be insufficient, still the allegation of the plaintiff's readiness and willingness to let the premises is equivalent, on general demurrer, to an averment of his being able to execute such lease; for, on the issue of readiness and willingness, the plaintiff must have proved that he was in a condition to make a valid demise. This was the opinion of Tindal, C. J., and the other judges of the Court of Common Pleas, in *Lawrence v. Knowles*, 5 N. C. 399 (E. C. L. R. vol. 35), 7 Scott 381; and this court laid down the same doctrine in *Hibblewhite v. M'Morine*, 6 M. & W. 200.† We there thought the plaintiff's title to the shares arose 'on the traverse of the readiness to convey, which must involve the capacity to do so.'" [WILLIAMS, J.—In *De Medina v. Norman*, the plaintiff alleged his readiness and willingness to grant the defendant some estate, and he could not.(b) Here, the plaintiff was in the defendant's service in the capacity of a painter, although a very bad one. BYLES, J.—It seems from the correspondence that the plaintiff represented himself *to be a competent scene- [*245 painter. The jury found that he was not, though he so represented himself, but without fraud. *The representation is in writing.*] The last observation disposes of the case as to the sixth plea. This is not an ordinary plea of fraud: but the very essence of it is, that the plaintiff, being incompetent, represented himself to be competent. [BYLES, J.—Strike out the word "fraudulent," and the plea is proved. The plaintiff was not competent; but he did not know that he was incompetent.] The ground of the decision in *Burgess v. Beaumont*, 8 Scott N. R. 668, 7 M. & G. 962 (E. C. L. R. vol. 49), was, the uncertainty as to what the plaintiff was to come to meet. [BYLES, J.—That case is very wide of this. My brother Williams has a case before him which seems very much in point, but which has not been alluded to at the bar.] In *Wallis v. Warren*, 4 Exch. 361, in an action for wrongfully discharging the plaintiff from the defendant's employ, the declaration alleged that the plaintiff had always been ready and willing and offered to remain in the employment of the defendant. The defendant

(a) *Knight v. Keech*, Carth. 271. And see the 5th section of the Common Law Procedure Act, 1854, 15 & 16 Vict. c. 76.

(b) See *Hayward v. Parke*, 16 C. B. 295 (E. C. L. R. vol. 81).

pleaded that the plaintiff did not offer to remain in the employment of the defendant: and the plea was held bad, as raising an immaterial issue,—the gist of the averment in the declaration being the readiness, which implied the willingness, of the plaintiff to continue the service from which the defendant wrongfully dismissed him.

WILLIAMS, J.—The authorities not having been so fully brought before the court as they might have been, we must take time to look into them for ourselves. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court:—

*246] *We are of opinion that this rule must be made absolute. When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes,—*Spondes peritiam artis*. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill.(a) An express promise or express representation in the particular case is not necessary.

It may be, that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, the employer probably would be held to have incurred all risks himself.

But, in the case under consideration, the correspondence shows, in addition to the implied representation, an express and particular representation by the plaintiff that he did possess the requisite skill.

The next question is this,—supposing that, when the skill and competency of the party employed are tested by the employment, he is found to be utterly incompetent, is the employer bound nevertheless to go on employing him to the end of the term for which he is engaged, notwithstanding his incompetency? This is a question upon which we have been furnished by the Bar with no authority, probably because

*247] such labour being seldom retained for a long time certain, the *question has not often arisen. But it seems very unreasonable that an employer should be compelled to go on employing a man who, having represented himself competent, turns out to be incompetent. An engineer is retained by a railway company, for a year, to drive an express train, and is found to be utterly unskilful and incompetent to drive or regulate the locomotive,—are the railway company still bound, under pain of an action, to intrust the lives of thousands to his dangerous and demonstrated incapacity? A clerk is retained for a year to keep a merchant's books, and it turns out that he is ignorant, not only of book-keeping, but of arithmetic,—is the merchant bound to continue him in his employment?

Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct. The rule of the civil law, "*Imperitia adnumeratur*," applies.

(a) See the observations of Jervis, C. J., in *Jenkins v. Betham*, 15 C. B. 189 (E. C. L. R. vol. 80).

We may add that a precedent of a plea grounded on the implied condition of competency is to be found in the late Mr. Joseph Chitty's work on Pleading, edited by the late Mr. Pearson, p. 363.

So, in *Spain v. Arnott*, 2 Stark. N. P. C. 256, Lord Ellenborough, speaking of a servant who had refused to perform his duty, says,—“The master is not bound to keep him on as a burthensome and useless servant to the end of the year.” And it appears to us that there is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired.

For these reasons, we think the substantial part of the plea was proved, and that the rule must be made absolute. Rule absolute.

Where the profession of the bailee in a *locatio operis faciendæ*, implies skill, the want of skill is imputable to him as gross negligence, and the law is the same, even in a gratuitous mandate: *Stanton v. Bell*, 2 Hawks, 145.

The rightful discharge of a clerk or servant for misconduct, is a good defence to an action for his wages: *Libbart v. Wood*, 1 Watts & Serg. 265; *Singer*

v. McCormick, 4 Watts & Serg. 266. “Faithful service,” it was said in these cases, “is condition precedent to the right to wages.”

Continuing incompetency is held in the civil law to be a sufficient ground for the dismissal of a servant: *Pothier, Contrat de Louage*, § 174; *Troplong, Contrat de Louage*, § 867.

*WESTLAKE *v.* ADAMS. July 5. [*248

The defendant, upon the apprenticing of his son to the plaintiff by a charitable society, agreed to give the plaintiff, in addition to a premium of 20*l.* to be paid by the society, four I. O. U.s for 5*l.* each, payable at intervals of a year. The boy was apprenticed and served the full term,—the indenture stating the consideration to be 20*l.*, paid by the society. After the expiration of the term the plaintiff sued the defendant upon his I. O. U.:—

Held, that the transaction was not a fraud upon the society.

Held also, by Willes, J., and Byles, J.,—dissentiente Williams, J.,—that the circumstance of the indenture being void by the 39th section of the 8 Ann. c. 9, for not truly setting forth the consideration, did not prevent the plaintiff from suing the defendant upon the I. O. U.,—the execution of the indenture (though void) being a sufficient consideration for the defendant's promise to pay the additional 20*l.*

THIS was an action for money payable by the defendant to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them: Claim 17*l.*

The defendant pleaded,—first, never indebted,—secondly, that, before and at the time of the making of the fraudulent agreement thereafter mentioned, the plaintiff used and carried on the art and business of ornamental and figure carving, and the defendant was then desirous of apprenticing his son William Henry Adams to the plaintiff to learn the said art and business, but was unable to pay the premiums required by the plaintiff in that behalf, and the defendant then applied to certain persons called and known as the Somersetshire Society, being persons united together for charitable purposes, that is to say, for the purpose of apprenticing the children of deserving poor of the county of Somerset resident in London, and requested the said Somersetshire Society, as an

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act of benevolence, and in exoneration of the defendant, with and out of their own proper moneys, and on their own behalf, to pay the premium required by the plaintiff for the purpose aforesaid: that thereupon, in consideration that the plaintiff would receive and take the said William Henry Adams as an apprentice to learn the plaintiff's said art, for the term of seven years, at and for the premium of 20*l.*, to be paid as hereinafter next mentioned, they the said Somersetshire Society promised the plaintiff to pay him in manner and form and at *the
*249] times and subject to the consideration in the indenture of apprenticeship hereinafter mentioned provided, with and out of their own proper moneys, and on their own behalf, as an act of benevolence, and in exoneration of the defendant, the said sum of 20*l.* as such premium as aforesaid; and the plaintiff then consented and agreed to and with the said Somersetshire Society to receive and take the said William Henry Adams, as his apprentice, upon the terms and for the premium last aforesaid: that, thereupon, afterwards, in pursuance and performance of the said agreement, by an indenture of apprenticeship sealed with the seal of the plaintiff, and duly made by the defendant, the said William Henry Adams, the plaintiff, and John Jenkyns, therein described as and then being the treasurer of the said Somersetshire Society, it was witnessed that the said William Henry Adams, with the consent of the defendant, and with the approbation of the said John Jenkyns, put himself apprentice to the plaintiff, to learn his said art, and with him after the manner of an apprentice to serve for the term of seven years aforesaid, and that the plaintiff, in consideration of the said premium of 20*l.* to be paid to him by the said John Jenkyns, or by the treasurer for the time being of the said Somersetshire Society, to wit, for and on behalf of the said society, at the times, and subject to the consideration therein mentioned, covenanted to teach and instruct, or cause to be taught and instructed, by the best means that he could, the said apprentice, in his art, finding for the said apprentice sufficient meat, drink, and lodging, and medicine in case of sickness, during the said term: that the said premium of 20*l.* was long before this suit duly paid by the said Somersetshire Society with and out of their own proper moneys, and on their own behalf, and as an act of benevolence, and in
*250] *exoneration of the defendant, to wit, by their treasurer at the time being, according to the terms and true intent and meaning of the said agreement and covenant in that behalf: that, at the time of the making of the agreements thereinbefore mentioned, it was secretly and fraudulently, and without the knowledge or privity and in fraud of the said Somersetshire Society, agreed by and between the plaintiff and the defendant, that the defendant should pay to the plaintiff a further premium or sum of 20*l.* for and in consideration of the plaintiff so receiving and taking the said William Henry Adams as such apprentice as aforesaid, over and above the said sum so agreed and covenanted to be paid by the said Somersetshire Society in that behalf as aforesaid: and that the said accounts stated in the declaration mentioned were stated of and concerning the said sum of 20*l.* so fraudulently agreed to be paid by the defendant to the plaintiff as aforesaid, and of and concerning no other debt, matter, or thing whatever.

Upon these pleas the plaintiff joined issue.

The cause was tried before Willes, J., at the first sitting at West-

minster in Easter Term last. The facts which appeared in evidence were as follows:—

The plaintiff carried on the business of a wood-carver in London. The defendant is a glover in Exeter, and was a native of Yeovil, in Somersetshire. In the month of May, 1850, the defendant, who then resided in London, in answer to an advertisement in one of the London newspapers, applied to the plaintiff to take his son William Henry Adams as an apprentice. The plaintiff required a premium of 40*l*. The defendant told him he was a poor man, but that a society called the Somersetshire Society, which was established for the apprenticing of the children of poor Somersetshire parents residing in London, had granted 20*l*. as a *premium to be paid with his son. The plaintiff consented to take the boy as apprentice, on the society paying 20*l*., and the [*251 defendant giving him an I. O. U. for other 20*l*., payable by instalments of 5*l*. per annum. To this the defendant agreed; and accordingly the boy was bound to the plaintiff for seven years by an indenture of which the following is a copy:

“SOMERSETSHIRE SOCIETY.

“Established, 1811.

“For apprenticing the children of poor Somersetshire parents residing in London.

“This indenture witnesseth that William Henry Adams, with the consent of William Adams, of, &c., and with the approbation of John Jenkyns, of, &c., Esq., treasurer to the Somersetshire Society in London, doth put himself apprentice to Samuel Westlake, of, &c., ornamental and figure carver, to learn his art, and with him after the manner of an apprentice to serve from the date hereof unto the full end and term of seven years from thence next following, to be fully complete and ended, during which term the said apprentice his master shall faithfully serve, his secrets keep, his lawful commands everywhere gladly do: he shall do no damage to his said master, nor see it to be done of others, but to his power shall let or forthwith give warning to his said master of the same: he shall not contract matrimony within the said term: he shall not play at cards, dice, tables, or any unlawful games, whereby his said master may have any loss with his own goods or others' during the said term, without license of his said master: he shall buy nor sell: he shall not haunt taverns or play-houses, nor absent himself from his said master's service day or night unlawfully: but in all things as a faithful apprentice he shall behave himself towards his said master and all his during the said term. And the said Samuel Westlake, in *con- [*252 sideration of the sum of 20*l*., to be paid to him by the said John Jenkyns, or by the treasurer for the time being of the society for apprenticing the children of the deserving poor of the county of Somerset resident London (one moiety to be paid immediately after this indenture shall be approved of by the committee at their first meeting after the execution thereof, and the remaining moiety to be paid at the expiration of half the said term, if the said apprentice then continue in the service of his said master), doth covenant with the said John Jenkyns to teach and instruct, or cause to be taught and instructed, by the means that he can, his said apprentice in the art of ornamental and figure carving, which he useth; finding the said apprentice sufficient meat, drink, and lodgings, and medicine in case of sickness, during the

said term: And, for the true performance of all and every the said covenants and agreements, each of the said parties bindeth himself unto the others by these presents. In witness whereof, the parties above named have put their hands and seals this 17th day of May, 1850.

(Signed) "WILLIAM ADAMS,
"WILLIAM HENRY ADAMS,
"SAMUEL WESTLAKE,
"JOHN JENKYNs."

(Seals.)

The defendant's son duly served the plaintiff under the above indenture until the expiration of the term. The two sums of 10*l.* and 10*l.* were paid by the Somersetshire Society, who were ignorant of the arrangement with the father for the payment of the additional 20*l.* The indenture,—the premium being paid by a public charity,—was unstamped. After the execution of the indenture, the defendant, who had then gone to reside in Exeter, at various times supplied the plaintiff with gloves; and, on his coming to London during the term, an account *253] was gone into between the parties, when it *was agreed that the value of the gloves so supplied was 3*l.*, and that the plaintiff should give up the four I. O. U.s which he held, and receive in lieu of them a fresh I. O. U. for 17*l.* and a receipt for the 3*l.*

On the part of the defendant it was insisted that the plaintiff was not entitled to recover, inasmuch as the taking of the I. O. U. for the additional premium was a fraud upon the Somersetshire Society, who would not have paid the 20*l.* unless they had believed that sum to be the entire consideration for the apprenticeship; and, further, that the indenture was void by the 8 Ann. c. 9, for not setting out the consideration truly.(a)

*254] *On the other hand, it was submitted that the indenture was not void, and that the defendant, having got all he bargained for, was bound to perform his contract.

The learned judge in substance told the jury that the indenture of apprenticeship was void, by the statute, for not truly setting out the

(a) The 35th section of that act enacts "that the full sum or sums of money received, or in any wise directly or indirectly given, paid, agreed or contracted for during the term, with or in relation to every such clerk, apprentice, and servant, as aforesaid, shall be truly inserted and written in words at length in some indenture or other writing, which shall contain the covenants, articles, contracts, or agreements relating to the service of such clerk, apprentice, or servant, as aforesaid, and shall bear date upon the day of the signing, sealing, or other execution of the same, upon pain that every master or mistress to or with whom or to whose use any sum of money whatsoever shall be given, paid, secured, or contracted for or in respect of any such clerk, apprentice, or servant as aforesaid, which shall not be truly and fully so inserted and specified in some such indenture or other writing, shall for every such offence forfeit double the sum so given, paid, secured, or contracted for," &c.

And the 39th section enacts "that all such indentures or writings as aforesaid, wherein shall not be truly inserted and written the full sum and sums of money received, or in any wise directly or indirectly given, paid, secured, or contracted for, with, or in relation to such clerk, apprentice, or servant, as aforesaid, or whereupon the duties payable by this act shall not be duly paid or lawfully tendered, or which shall not be stamped or lawfully tendered to be stamped, according to the tenor and true meaning of this act, within the respective times herein for that purpose severally and respectively limited, shall be void, and not available in any court or place, or to any purpose whatsoever, and the clerk, apprentice, or servant whom the same shall concern or relate to shall in such case be utterly incapable of being free of any city, town, corporation, or company, and of following or exercising the intended profession, trade, or employment, any charter, law, or custom to the contrary notwithstanding."

Section 40 exempts from stamp duty indentures the premium whereof is paid by the parish or by any public charity.

consideration ; but that, if the consideration for the I. O. U. upon which the action was brought was the execution of the indenture, such execution was a sufficient consideration for the defendant's promise, notwithstanding the indenture might be void. The plaintiff accordingly had a verdict for 17*l*.

Kingdon, in Easter Term last, moved for a new trial, on the ground of misdirection. He submitted that the contract to receive the additional 20*l*. was a fraud upon the Somersetshire Society, who would not have consented to pay the sum they did, if they had known that it was not the full and only consideration for the apprenticing the defendant's son. [WILLES, J.—I told the jury that there could be no fraud, if the defendant got what he bargained for.] This sort of private bargain is contrary to public policy,—like the case of a creditor who has signed a composition-deed bargaining for some private advantage to himself beyond that which the general body of creditors receive: *Jackson v. Duchaire*, 3 T. R. 551. [BYLES, J.—Is not the object of the society equally attained, whether the master gets more than they pay [*255 or not?] The plaintiff covenants with the society to teach the boy his trade, and to feed and lodge him, for 20*l*. [WILLES, J.—There was no evidence that the plaintiff knew anything about the rules of the society. CROWDER, J.—Or to show that the society would not have advanced the 20*l*. if they had known of the arrangement with the boy's father.] In *The King v. The Inhabitants of Aylesbury*, 3 B. & Ad. 569 (E. C. L. R. vol. 23), a pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term ; and he did so. It did not appear that the trustees were privy to this engagement. The Court of Queen's Bench held that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master, within the 55 G. 3, c. 184, Sched. part 1, tit. *Apprenticeship*, or, assuming that it was, then it was void as being a fraud upon the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. Parke, J., there said: "It is said that there is a benefit conferred on the master by the agreement of the father to provide clothes, and that that is equivalent to a sum of money. Assuming it to be so, the agreement was then a fraud on the trustees of the charity, for it is clear from the covenant in the indenture that they bound out the pauper on the faith that the master was to find apparel, &c.: and the latter could not have sued the father for not providing clothes, for *ther was no binding engagement on him so to do.*"

Then, the 8 Anne, c. 9, ss. 35, 39, make the indenture absolutely void to all intents and purposes, for not setting out the full sum given "with or in relation to" the apprentice. *Jackson v. Warwick*, 7 [*256 T. R. 121, is a distinct authority. It was there held that no action can be maintained by the plaintiff on a note given to him by the defendant as an apprentice fee with his son who was to be bound to the plaintiff, if it appear that the indenture executed was void by the 8 Ann. c. 9, for want of the insertion of such premium therein, and a proper stamp in respect of the same ; although the plaintiff did in fact maintain the

apprentice for some time, and until he absconded. [CROWDER, J.—Here, the party has had all the benefit that could result from the covenant.] Not so; for, the indenture being void, the apprentice loses all the benefit that would have resulted to him from having served his time under a valid indenture. In *The King v. The Inhabitants of Amer-sham*, 4 Ad. & E. 508 (E. C. L. R. vol. 31), 6 N. & M. 12 (E. C. L. R. vol. 36), the indenture was held void on this ground.

CROWDER, J.—Upon the first point, I am of opinion there should be no rule. It does not appear that there was anything like fraud: and the mere fact of the existence of the indenture is nothing. In the cases adverted to, there was a clear intention to deceive, and the party advancing the money was deceived. There is nothing here to show that any deception was practised by the plaintiff upon the Somersetshire Society, or that he had any intention to deceive them. But, upon the other point, viz. that the consideration was not truly stated, the rule may go.

F. Russell, on a subsequent day, showed cause.—This is a mere stamp objection. The provisions of the 8 Ann. c. 9, are modified by the 20 G. 2, c. 45, ss. 5 and 6. [WILLIAMS, J.—The object of the 8 Anne, c. 9, s. 39, is plain,—to insure the payment of the proper *257] duty, by declaring the indenture void if the full consideration is not inserted. BYLES, J.—Do you find any case where the non-insertion of the right sum was held to be cured by the subsequent payment of the proper duty? There is no decision to that effect. The jury having found that the defendant contracted for this very indenture, it does not lie in his mouth to urge this objection. Nor can he say that the contract is void, when the whole has been performed by the maintenance and instruction of the apprentice for the full period contracted for: *Mann v. Lent*, 10 B. & C. 877 (E. C. L. R. vol. 21), 5 M. & R. 660. *Jackson v. Warwick*, 7 T. R. 121, was cited; but Lord Tenterden said: “If the father had paid the premium, instead of having given the bill for it, he could not, under the circumstances of this case, have recovered it back; for, the son was not only maintained by the master for a time, but might have compelled the latter to continue his maintenance and instruction, by causing the indenture to be stamped. There was not, therefore, a total failure of consideration.” In *The King v. The Inhabitants of Bourton-upon-Dunsmore*, 9 B. & C. 872 (E. C. L. R. vol. 17), 4 M. & R. 631, a married woman, on binding her son, an illegitimate child, an apprentice, agreed with the intended master that 10*l.* should be the premium inserted in the indenture, but, that he should receive *something more*. The husband of the mother of the apprentice paid the 10*l.*, and the mother, without her husband’s knowledge, paid the master a further sum of 2*l.* 12*s.* 6*d.* It was held, that, there being no *valid contract* to pay more than the sum of 10*l.*, the full sum received, given, paid, secured, or contracted for at the time of the execution of the indenture, was inserted in the indenture within the meaning of the statute 8 Ann. c. 9, s. 39, that the indenture was valid, and that a settlement was gained by service under it. And Bayley, J., *258] said: “The sum *really* and *bonâ fide* paid and contracted for was inserted in this indenture. There was no binding agreement for the payment of any sum beyond that amount. The promise made by the feme covert did not bind her.” At all events, the giving up the

four pieces of paper originally given to the plaintiff was a sufficient consideration, upon the authority of *Haigh v. Brooks*, 10 Ad. & E. 309, 323 (E. C. L. R. vol. 37), 2 P. & D. 477, 4 P. & D. 288: and, though the contract might not have been enforceable, an action will lie upon the account stated: *Cocking v. Ward*, 1 C. B. 858.

Kingdon, in support of his rule.—The indenture was clearly void under the statute 8 Ann. c. 9, and therefore there was a total failure of consideration for the defendant's promise. The statute makes the indenture void on two grounds,—if the true amount of the premium is not inserted, and if the stamp is insufficient. The 20 G. 2, c. 45, may cure the latter defect, but not the former: the case of *Mann v. Lent*, therefore, does not affect the question. In that case it was competent to the parties to cure the defect: here the defendant did not get all the consideration he contracted for. The *King v. The Inhabitants of Baildon*, 3 B. & Ad. 427 (E. C. L. R. vol. 23), is more to the purpose. There, the consideration expressed in an indenture of apprenticeship was 4*l.* to be paid to the master by a public charity; but the apprentice's mother privately agreed to pay, and did pay the master, after the execution of the indenture, 1*l.* in addition: and it was held that the indenture, though stamped, was void by the 8 Ann. c. 9, s. 39, the full sum contracted for with or in relation to the apprentice not being inserted. Lord Tenterden says: "The object of the legislature undoubtedly was, to secure the insertion in the indenture of the whole sum paid or contracted for with the apprentice. But the 39th *section evidently refers to cases where a duty is payable; [*259 whereas, in *The King v. The Inhabitants of Oadby*, 1 B. & Ald. 477, no duty whatever was payable, because the whole premium was defrayed by public charity. That is not so here. Then it is said, that, according to *Rex v. The Inhabitants of Bourton-upon-Dunsmore*, 9 B. & C. 872 (E. C. L. R. vol. 17), 4 M. & R. 631, unless there be a binding contract for the payment of the sum with the apprentice fee, it need not be inserted in the indenture. But there the decision turned upon the disability of the contracting party, who was a feme covert. Here, we cannot presume that the pauper's mother (who is named as the consenting party in the indenture) was a feme covert. It is said that the contract for the additional sum was void by the act of parliament, and that the master could not have sued for this sum, which was not mentioned in the indenture. We are not called upon to decide how that would have been, if an action had been brought by the master; because the clear intention of the legislature was, that everything received, given, paid, secured, or contracted to be paid with the apprentice, should be inserted in the indenture. Here there was a contract to pay a sum not inserted. A party capable of contracting, and making such a contract, though it were honorary, might not know that the statute would protect him from its performance: but a married woman must be presumed to know that she is not liable upon a contract made by her. Perhaps it would have been better if the legislature had enacted that all engagements to pay more than the sum mentioned in the indenture should be utterly void. But the words of the statute, as they bear upon this case, are so unambiguous, that, without repealing the clause, we cannot hold this indenture to be valid." Here, the contract was, that the defendant's son should be taught the trade of a wood

*260] carver *under a valid indenture. [BYLES, J.—No: under the particular indenture.] A contract to apprentice must, it is submitted, mean, by a legal and valid instrument. Before the execution of this indenture, it had been arranged that the plaintiff should receive 40*l.*, one half from the Somersetshire Society, the other half from the defendant. That clearly brings the case within the words of the 39th section of the statute of Anne. The sum agreed to be paid with or in relation to the apprentice was not inserted in the indenture. The objection was held fatal in *The King v. The Inhabitants of Amersham*, 4 Ad. & E. 508 (E. C. L. R. vol. 31), 6 N. & M. 12 (E. C. L. R. vol. 36). Then, if the indenture is void, the plaintiff clearly cannot recover. The case is virtually concluded by *Jackson v. Warwick*, 7 T. R. 121. Then, as to the account stated,—there could be no better consideration for the giving of the second I. O. U. than there was for the first. Here there is nothing but an account stated, the consideration for which entirely failed; whereas, in *Cocking v. Ward*, 1 C. B. 858, the defendant got everything he contracted for. [BYLES, J.—There was a point open in *Jackson v. Warwick*, which is not open here: the only plea here is, never indebted.] In *Wilson v. Wilson*, 14 C. B. 616 (E. C. L. R. vol. 78), upon a sale of a leasehold, the purchaser agreed to pay a deposit of 50*l.*, and the residue on completion. Instead of actually paying the 50*l.*, he gave the vendor 5*l.* and an I. O. U. for 45*l.*: and it was held that the vendor, failing to make a good title, was not entitled to recover the 45*l.* upon an account stated; and that the defence was admissible under never indebted. [WILLIAMS, J.—I confess I do not see any substantial difference between *Cocking v. Ward* and the present case, so far as the account stated is concerned. Might not the defendant there have been turned out?] No. The widow of the former tenant had surrendered the premises, and the defendant had become tenant.

*261] *At the end of the judgment, Tindal, C. J., says: “The principle may not, perhaps, be applicable to cases where it can be shown the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming: but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it.” Can it be doubted that the parties here bargained for a valid and binding indenture of apprenticeship? At the time the defendant gave this I. O. U., he had not got what he bargained for.

WILLIAMS, J.—You attempt to distinguish *Cocking v. Ward* from the present case upon two grounds, upon one of which I think consideration is necessary, viz., as to whether the defendant here received all the consideration that formed the inducement or motive for his giving the I. O. U. But, as to the other, you rely upon a distinction between an originally void consideration, and an illegality created by statute. Now, here, the *indenture* is made void by the statute, but not the debt. That ground of distinction, therefore, fails. But the other question, whether, notwithstanding the finding of the jury, the facts do not of necessity show that the whole consideration could not have been in existence at the time of the giving of the I. O. U., deserves deliberation.

Cur. adv. vult.

WILLES, J.—In this case the court is not unanimous. The cause was

tried before me, and the rule, which complains of my direction to the jury, was argued before my Brothers Williams and Byles and myself. The direction was, in substance, that the *indentures of apprenticeship were void for not stating the full consideration, by [*262 reason of the provisions of the statute of Anne; but that, if the consideration for the I. O. U. upon which the action was brought was the execution of the indenture, notwithstanding it might be void, such execution was a sufficient consideration for the promise. I did not reserve the point. In the absence of my two learned Brothers, I will proceed to read their respective opinions.

WILLIAMS, J.—I am of opinion that it is impossible to distinguish this case from *Jackson v. Warwick*, 7 T. R. 121. There, the action was brought on a note given by the defendant as an apprentice fee with his son to the plaintiff, to whom the son was bound. It appeared that no mention was made in the indentures of this premium having been given with the apprentice; nor was there any stamp thereon in proportion to their value, as required by the statute 8 Ann. c. 9; in default of which, by the 39th section, the indentures are declared to be void and unavailable for any purpose: and it was held that no action could be maintained on the note, because it was given in consideration of the relation of apprenticeship, which these parties supposed was to be created between the defendant's son and the plaintiff, which relation, it turned out, never did exist between them, and therefore the consideration for the note wholly failed, notwithstanding that the plaintiff had provided board for some time for the apprentice, who then absconded.

In the present case, the circumstances are substantially the same, except that the defendant, instead of giving his promissory note, gave an I. O. U. for the premium, on which the action was brought as upon an account stated.

It cannot be disputed that the I. O. U. was *prima facie* sufficient evidence to sustain the plaintiff's case; but that it was open [*263 to the defendant to rebut it, by showing that the account was stated in respect of a debt which had no legal foundation. And this was shown, I think, according to *Jackson v. Warwick*, as soon as it appeared that the supposed debt was founded on a promise to pay, the premium, the consideration for which had wholly failed by reason of the indentures being void. The promise was made by way of purchase of valid indentures; and no such indentures ever existed. And this differs the present case from *Cocking v. Ward*, 1 C. B. 858 (E. C. L. R. vol. 50), where the defendant had had the full benefit of the original contract.

It was, however, contended, on behalf of the plaintiff, that the present case is distinguishable from *Jackson v. Warwick*, by reason of the finding of the jury that the defendant had received all the consideration he expected to receive at the time of making the promise of which the I. O. U. was the evidence. But it is, I think, impossible to support such a view of the case, unless there were some evidence that the defendant knew the indentures were void when he made the promise. It would, in truth, be an evasion by the court of the authority of *Jackson v. Warwick*, by leaving it for the jury to decide that a consideration existed which that case decides has wholly failed.

It was further contended that *Jackson v. Warwick* is not applicable, because it appeared at the trial of the present case that the I. O. U. in

question was substituted for four other instruments of the same kind which had been originally given by the defendant as the security for the payment of the premium, and which had been destroyed because the plaintiff had requested the defendant to give him a new I. O. U. in lieu of them, on a suggestion that they were invalid in form. And it was [*264] argued that this destruction of them was a new *consideration, which would sustain a new promise, according to the principle of *Haigh v. Brooks*, 10 Ad. & E. 323 (E. C. L. R. vol. 37), 4 P. & D. 288. But surely there was an implied understanding between the parties in the present case that the defendant should not incur any further liability on the new security than on the old. It is difficult to understand how the plaintiff can be in a better condition because the defendant acceded to his request to substitute the one document for the others as evidence of the original promise.

It was further contended for the plaintiff, that, according to the case of *Mann v. Lent*, 10 B. & C. 877 (E. C. L. R. vol. 21), 5 M. & R. 660, M. & M. 240 (E. C. L. R. vol. 22), the indentures might be rendered valid, by causing them to be properly stamped under the 20 G. 2, c. 45, s. 5; and so there would not be a total failure of consideration. But the effect of that statute, I think, is, only to render the indentures, after they shall have been properly stamped, as good and available as if the proper stamp-duty had been paid in the first instance; and not to cure the defect of omitting to mention the true amount of the premium.

On the whole, therefore, I am of opinion that there is nothing to distinguish the present case from *Jackson v. Warwick*. That case has been cited in the argument of subsequent cases, and not disapproved of, but distinguished by the court,—as in *Grant v. Welchman*, 16 East 207. It is also stated without any disapprobation in *Bayley on Bills*, 4th edit. p. 392. Until, therefore, it shall have been overruled in a court of error, I think it is a binding authority, which must govern this case; and, consequently, that this rule ought to be made absolute.

BYLES, J.—It is with great diffidence and regret that I am constrained to differ from my Brother Williams. But I am of opinion that there [*265] has been no *misdirection, that the proper question has been left to the jury, and that the plaintiff is entitled to retain his verdict.

There appears to me to have been a full consideration for the last I. O. U., on which the action is founded. I think the execution of the indenture of apprenticeship by the plaintiff, independently of his subsequent performance of his covenant, was a good consideration for the four I. O. U.s originally given. I agree that the statute 8 Ann. c. 9, s. 39, makes the indenture void, because the full consideration was not inserted in the instrument; and that this defect is not curable by the subsequent statute of 20 G. 2, c. 45, s. 5. But still, the indenture was the very indenture which the plaintiff agreed to give, and which the defendant agreed to take. There was no fraud: the defendant knew all the facts, and cannot be heard to say that he was ignorant of the law. It cannot even be said that the deed, though liable to be proved to be void, was valueless; for, it was a good deed on the face of it, and had the evidence of the additional consideration perished, or not been forthcoming, the deed would have had its full operation in every way.

It is an elementary principle, that the law will not enter into an

inquiry as to the adequacy of the consideration ; so that much less consideration than here existed might have sufficed.

Lastly, it must be remembered that the defendant in this case has received a full performance of the terms of the indenture at the hands of the plaintiff. The jury have, I think, made an end of the question ; for, they have found (as they well might) that the defendant received what he bargained for, and all that he bargained for.

The only difficulty I feel, is, in distinguishing this case from the case of *Jackson v. Warwick*, 7 T. R. 121. But that was an action on a promissory note : the defendant *had there certainly received some consideration : and the law was not at the time so well settled as [*266 it has since been, that an action to recover the full amount due on a bill or note can be sustained unless the consideration fails entirely, or fails to an ascertained and liquidated amount. Moreover, the language of Lord Tenterden, in *Mann v. Lent*, 10 B. & C. 884 (E. C. L. R. vol. 21), 5 M. & R. 660, seems to import some doubt in the mind of the Court of King's Bench as to the correctness of Lord Kenyon's decision. And Lord Tenterden in *Mann v. Lent* proposes as the test this inquiry, whether, if the father, instead of having given the bill, had actually paid the money, he could have recovered the money back. Surely in this case he could not have done so ; for, it would have been money paid by him with full knowledge of the facts. But the distinction between *Jackson v. Warwick* and the present case is this, that there Lord Kenyon says it was the master's duty to get the consideration properly inserted, and the instrument properly stamped ; whereas, here, the master had done, as the jury have found, all he engaged to do.

On these grounds, I think the transaction, such as it was, supported the original I. O. U.s.

It is not necessary to say whether the last I. O. U., having been given in consideration of the surrender of the original I. O. U.s, could have been void for want of consideration ; although in *Haigh v. Brooks*, the majority of the Court of Exchequer Chamber intimated their opinion, that, had the document in that case surrendered by the plaintiff as a consideration for the promise of the defendant been a mere piece of paper, it would have sufficed to sustain the promise.

WILLES, J.—Having now read the opinions of my two learned Brothers, I regret that it falls to me to decide upon an appeal against my own ruling, though I have *the consolation to think that in so doing I shall decide in favour of that party on whose side is the [*267 justice of the case. I am not ashamed of having been somewhat astute at the trial to defeat what I conceived to be an unjust and unworthy defence : and of course I do not express any different opinion now. As my Brother Byles agrees with me, the result is that the rule for a new trial must be discharged. Rule discharged.

In *Nickerson v. Howard*, 19 Johns. note, the defence was that the assignment was invalid, and the note there-
113, it appeared that the defendant ment was invalid, and the note there-
had given to the plaintiff a promissory fore void. But the court held, that
note, as the price or consideration for whether the assignment was valid or
the assignment of an apprentice to E. not, it could only be questioned in a
at his request. In an action on the suit by E. to recover back the price, or

in a suit or proceedings in behalf of the apprentice. "*Non constat*," it was said. "in this case, but that the apprentice has voluntarily continued to serve his new master by consent of all parties." But an opposite conclusion was arrived at in *Allison v. Norwood*, Busbee's R. (N. C.) 414; where it was held that a note given by the assignee of an apprentice to the original master was absolutely void, as against the policy of the law. A similar decision was made in *Davis v. Coburn*, 8 Mass. 299, though there the apprentice had actually absconded from the assignee.

In general an indenture of apprenticeship, which is not conformable to the particular statutory regulations, is voidable only by the apprentice, and cannot be avoided by another person or party: *Fowler v. Hollenbeck*, 9 Barb. S. C. 314; *Matter of McDowles*, 8 Johns. 328.

How far a partial failure of consideration may be set up to an action on a bill or note, as to which there is considerable variance among the authorities, see *Byles on Bills*, by Sharswood, 99; 2 Kent's Comm. 473.

DUNSTON v. PATERSON. July 5.

A temporary or compulsory residence, at the time of the commencement of an action, in a gaol, does not constitute the place of detention the "dwelling" of the party, within the 128th section of the 9 & 10 Vict. c. 95.

The court will require a strong case to be made out before they will overrule the exercise of a judge's discretion under the 15 & 16 Vict. c. 54, s. 4.

The plaintiff having recovered only 5*l.* in an action for false imprisonment, and the judge having declined to certify under the County Court Act, 15 & 16 Vict. c. 54, s. 4.—Held, that the plaintiff was equally disentitled to the costs of a demurrer upon which she obtained judgment, as to the costs of the issues of fact.

THIS was an action for false imprisonment brought against the defendant, the late sheriff of the county of Kent.

See the pleadings, 2 C. B. N. S. 495 (E. C. L. R. vol. 89).

At the trial before Willes, J., at the sittings in London after Trinity Term, 1857, it appeared that the sheriff having a ca. sa. against Emily Mary Dunston, the sister of the plaintiff, an officer armed with a warrant proceeded to a place called Lock's Bottom, near Farnborough, in Kent, for the purpose of apprehending her; that he there saw the plaintiff, who answered to the name of "Miss Dunston," and lodged her in Maidstone gaol; that an application was afterwards made to a judge at Chambers for the plaintiff's discharge, but, for some unexplained reason, it was not persisted in; and that the plaintiff remained in custody about four or five months, during a great portion of which time the sheriff and his officers knew she was not the person named in the ca. sa.

*268] The defence was, that the plaintiff, by passing herself off as the real defendant in the original action, for the purpose of enabling her sister to escape, was the author of her own imprisonment, and was consequently not entitled to complain of the sheriff's wrongful act.

This objection had already been disposed of upon a demurrer to the rejoinder to the plaintiff's second replication,—2 C. B. N. S. 495 (E. C. L. R. vol. 89),—and it was insisted for her at the trial, that, assuming that she had at first misled the officer, that was at all events no justifi-

cation for her detention by the sheriff after he knew she was unlawfully in his custody.

The case went to the jury with strong remarks by the learned judge upon the plaintiff's conduct; and the jury, after some deliberation, returned a verdict for the plaintiff, with 5*l.* damages.

The learned judge stayed execution until the fifth day of Michaelmas Term, and reserved leave to the defendant to move to enter a verdict for him, on the ground that the plaintiff, having misled the officer, was not entitled to complain of the arrest or detention.

A summons was afterwards taken out calling upon the defendant to show cause why the plaintiff should not be allowed her costs pursuant to the County Court Act, 15 & 16 Vict. c. 54, s. 4. This summons was returnable before Cresswell, J., who referred it to Willes, J., before whom it came on to be heard on the 27th of November, 1857, when the application was refused. On the 11th of January last,

Woollett obtained a rule calling upon the defendant to show cause why the plaintiff should not recover against him her costs, as well of the issues in law as of the issues in fact joined between the said parties. The motion was founded upon an affidavit of the plaintiff, in which she was described as "at present residing at *Locks Bottom, near Farnborough, in the county of Kent," and which stated in substance as follows:—That the writ of summons in this cause was issued on the 2d of March last, at which time the deponent was a prisoner in Maidstone Gaol, in the county of Kent, where she had been taken by a warrant granted by the defendant against her sister, then Emily Mary Dunston, spinster, but now the wife of J. L. Manning, of Lock's Bottom aforesaid, on the 4th of December, and in which gaol she remained until discharged under a writ of habeas corpus issued out of this court on the 8th of June last, by Crowder, J.: that, on the said 4th of December, the deponent was on a visit to the said J. L. Manning at his house at Lock's Bottom aforesaid by reason of her said sister Emily Mary being about to become his wife, and who wished her to remain there with her until that event occurred: that Maidstone Gaol is more than twenty miles distant from the residence of the defendant, who resided at the time this action was brought at Chiselhurst, in the county of Kent, and more than twenty miles from the place where the deponent was dwelling, viz. at Maidstone Gaol aforesaid: and that, previous to the said 4th of December, the deponent had not for a considerable period any settled abode or permanent residence; and that, on the said 4th of December, when she left her sister's at Lock's Bottom aforesaid, where she was staying only on a visit, *she had no other abode than that of Maidstone Gaol, and no residence, lodging, or dwelling-place other than the said gaol when she commenced this action against the defendant.*

Montagu Chambers, Q. C., showed cause, upon affidavits, the material statements in which were as follows:—That, the defendant's attorneys, having been informed that the plaintiff was not in a position to *pay the defendant's costs, declined to incur the expense of making an application to set aside the verdict, anticipating that the plaintiff would not be entitled to the costs of the action, and therefore allowed the time for moving the court to expire without making any such motion, the plaintiff not having, to the knowledge of the deponent, applied for any certificate or order for costs before the time for

moving to set aside the verdict had expired : that, on the 10th of November last, the plaintiff's attorney delivered her bill of costs in the action, with notice of taxing for the following day : that the master declined to tax, without a certificate or order : that, on the same day, the plaintiff's attorney took out a summons calling upon the defendant to show cause why the plaintiff should not recover her costs of this action, which summons was returnable on the 13th of November, before Cresswell, J., who referred it to Willes, J.; and that, on the 27th, the summons was heard before Willes, J., who endorsed the same "no order:" that Willes, J., attended at Chambers to dispose of summonses on the 1st of July, and on the 17th and 21st of August last, on either of which days the plaintiff's application for costs might have been made before him : that, at the time the plaintiff's alleged cause of action arose, the plaintiff resided at Lock's Bottom, in the parish of Farnborough, in the county of Kent, and that the defendant resided at Lessons, in the parish of Chiselhurst, in the same county, both at the time the alleged cause of action arose and also at the time of the commencement of the action, and that the said respective residences of the plaintiff and the defendant are within the distance of twenty miles of each other, that is to say, within six miles, and are both within the Bromley district of the county court of Kent : that the plaintiff's cause of action arose wholly or in *271] some material point within the jurisdiction of the said Bromley district of the county court of Kent, and not elsewhere : that the plaintiff stated at the trial that she was residing at Lock's Bottom, with her sister Emily Mary, when she personated her; and that she had resided at Lock's Bottom long before the arrest, and returned to the same place, where, as the deponent was informed, she still remained.

The application is out of time; and the delay has been productive of serious injury to the defendant, inasmuch as he was thereby induced to abstain from availing himself of the leave reserved to him at the trial. In the case of an appeal from the decision of a judge at Chambers, the application must be made within the ensuing term: *Orchard v. Moxsy*, 2 Ellis & B. 206 (E. C. L. R. vol. 75); *Meredith v. Gittens*, 21 Law J., Q. B. 273. Here, the trial took place at the sittings after Trinity Term, 1857, and no application is made for a certificate until the 11th of November; and, that being refused, the plaintiff makes this motion in the present Hilary Term. [WILLIAMS, J.—You contend that the application for costs under the 15 & 16 Vict. c. 54, s. 4, must be made within the first four days of the ensuing term?] Yes.

As to the merits,—the question turns upon the 9 & 10 Vict. c. 95, s. 128, which gives the superior court a concurrent jurisdiction with the county court, "where the plaintiff *dwells* more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought." Did the plaintiff, at the time of commencing this action, dwell, within the meaning of that statute, more than twenty miles from the defendant? A temporary residence will not do: it must be the *272] party's real home. *Now, Maidstone Gaol was not the plaintiff's real home: in her affidavit she describes herself as "at present" residing there: and in the declaration she avers as the damage she sustained, that she was "removed from her home and livelihood."

When released from confinement, she returned to Lock's Bottom; and she resides there now. [WILLES, J.—When the matter was before me at Chambers, I declined to exercise a discretion. I thought Maidstone Gaol was not the plaintiff's "dwelling" within the 128th section of the 9 & 10 Vict. c. 95; and the fact of her having gone immediately back to her sister's house at Lock's Bottom was sufficient to show that that was her residence within the statute.] In *Macdougall v. Paterson*, 11 C. B. 755 (E. C. L. R. vol. 73), it was held, that, where a man, having his permanent residence at one place, has a lodging for a temporary purpose only at another place, he does not "dwell" at the latter place, within the meaning of the 128th section of the 9 & 10 Vict. c. 95, so as to oust the jurisdiction of the superior courts. [COCKBURN, C. J.—In the settlement cases, "residence" and "dwelling" are treated as synonymous. In *Withorn*, app., *Thomas*, resp., 8 Scott N. R. 783, 7 M. & G. 1 (E. C. L. R. vol. 49), *Lutw. Reg. Cas.* 125, the appellant, a freeman of the borough of Tewkesbury, resided and carried on business at Gloucester, which is distant from Tewkesbury more than seven miles: he was a married man and kept one domestic servant at his house at Gloucester: for the purpose of qualifying himself to vote for the borough of Tewkesbury, he had, since 1841, paid to one S. 9d. per week for a furnished bed-room in S.'s house situate within the borough, and also a closet about six feet by three, without a window, of which closet the appellant kept the key: between January and July 1844, he slept in the bed-room *twelve* times, and during the year ending July 1844, *sixteen* times, on his coming to Tewkesbury *on business: but he had never taken [*273 his meals in the house." The revising barrister having held that this was not a *bonâ fide* residence within the borough to satisfy the 2 W. 4, c. 45, s. 27, the court affirmed his decision.](a)

Woollett, in support of his rule.—The question is, whether the plaintiff is not under the statute 15 & 16 Vict. c. 54, s. 4, entitled to her costs, irrespective of any discretionary power in the judge. That section repeals the 13th section of the 13 & 14 Vict. c. 61, and enacts, that, "in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of such act, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action is brought, or to the satisfaction of a judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95,—or for which no plaint could have been entered in any such county courts,—or that such action was removed from a county court by certiorari,—or that there was sufficient reason for bringing such action in the court in which such action was brought,—then and in any of such cases the court in which such action is brought, or the said judge at Chambers shall (a) thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the *plaintiff shall have [*274 the same judgment to recover his costs that he would have had

(a) In *Story's Conflict*, § 47. It is said that "residence in a place, to produce a change of domicile, must be voluntary. If, therefore, it be by constraint, or involuntarily, as, by banishment, arrest, or imprisonment, the antecedent domicile of the party remains."

(b) This is imperative, and not permissive or discretionary only: see *Macdougall v. Paterson*, 11 C. B. 755 (E. C. L. R. vol. 73).

if the before-mentioned act of the 13 & 14 Vict. c. 61, had not been passed." If the court should think there was sufficient cause for bringing the action in the superior court, the plaintiff has a right to come here by way of appeal: and it is difficult to say that the plaintiff was not justified in bringing her action in the superior court, when the defendant himself thought proper to raise a point of law for the decision of the full court upon demurrer. This was a very grave question, involving the liberty of the subject, of which the law is always tender. [COCKBURN, C. J.—I do not think we ought to be very tender of the detention of a person who thought fit to pass herself off for another, in order to frustrate the process of the court. WILLIAMS, J.—On the former occasion, we thought the defendant was justified down to the time when he knew that the plaintiff was not the real party. COCKBURN, C. J.—You say that the point involved in the demurrer was a fit one for discussion in a superior court. That is a point which is worth considering: and it is already raised in a case of *Craske v. Smith*, which is now pending. It may be convenient to suspend the discussion of the point for the present.]

Then, as to the concurrent jurisdiction,—the plaintiff swears, that, from the time the cause of action accrued, and at the time of the commencement of the action, she had no other abode or dwelling-place than Maidstone Gaol. In construing the act, regard must be had to the intention of the legislature, which manifestly was, that a plaintiff should not have to go more than twenty miles in search of his debtor, in order to sue him in the county court. In *Attenborough v. Thompson*, 2 Hurlst. & N. 559,† it was held, that, under the 17 & 18 Vict. c. 36, s. 1, which requires an affidavit to be filed of the description of the residence of *275] every attesting witness *to a bill of sale, it is a sufficient compliance with the statute if an attorney's clerk is described as of the office or place of business of his employers, though he sleeps elsewhere. Pollock, C. B., there says that "the object of the enactment was that information should be given where the witness was to be found, in order that he might answer any inquiries respecting the bill of sale." The like was held by the Court of Queen's Bench in *Blackwell v. England*, 27 Law J., Q. B. 124. Now, the word "residence" is quite as large as "dwelling." If it be urged that here the residence was compulsory, what is to be said of the residence of an officer in barracks, which is equally compulsory? Take the case of a gipsy, who has no fixed abode: he resides or dwells wherever he sleeps. [CROWDER, J., referred to *Regina v. Richard Hughes, Dears. & Bell* 188. There, the prisoner was convicted on an indictment for perjury on the hearing of an affiliation summons. The applicant for the summons had returned from service to the house of her parents to be confined; and, after remaining there for eight months, during which time she had no other home, she went to lodge at D. for the purpose of affiliating her child. D. was not in the same petty-sessional division as the residence of her parents; but she went to D., not fraudulently or for any improper reason, but from motives of convenience; and, after lodging at D. for three weeks, she applied for and obtained the summons in the petty-sessional division in which D. was situate. She stated that she meant to leave D. immediately after the order, and she did leave the day after the order was made, and went into service without returning to her parents. The jury

found she had no other home than D., and that she was residing there, if in point of law she could under the circumstances be considered to be so. It was held that her residence was at D., and therefore, [*276 *that, the magistrates of the petty-sessional division in which D. was situate having jurisdiction, the conviction was right.] Under the poor-law acts, a party's residence is, where he sleeps. [COCKBURN, C. J.—I am inclined to think that Maidstone Gaol could not be said to have been this person's dwelling-place. But I confess I think there is a good deal in the point as to the propriety of bringing the action in the superior court. *Chambers*.—That point is concluded by the exercise of discretion by the learned judge. COCKBURN, C. J.—Subject to review. You raise a grave question of law by demurrer. *Chambers*.—The fact of the defendant's demurring affords no justification for the plaintiff's bringing her action in the superior court. If the action had been brought in the county court, the judge would have said, as was said here, that the plaintiff's misrepresentation, whereby she induced the defendant to take the wrong party into custody, deprived her of the right to claim substantial damages for the subsequent detention.]

Cur. adv. vult.

WILLES, J., delivered the judgment of the court:—

This case stood over to await the decision of the court in *Craske v. Smith*, 4 C. B. N. S. 446 (E. C. L. R. vol. 93), which, however, went off upon a point unnecessary to be considered in the present case; and we proceed to dispose of it upon its own merits.

It was a rule obtained by the plaintiff calling upon the defendant to show cause why the court should not direct that the plaintiff recover costs, notwithstanding the amount of damages, pursuant to the county court act, 15 & 16 Vict. c. 54, s. 4.

The cause of action was, an alleged false imprisonment, and so was within the general jurisdiction of *the county court; and, as the plaintiff at the trial obtained a verdict for 5*l.* damages only, [*277 unless the case falls within one of the exceptions in the statute, she is not entitled to any costs.

The application was based upon two grounds,—first, that, at the time of action brought, the plaintiff dwelt more than twenty miles from the defendant,—and, secondly, that, if that were not so, still there was sufficient reason for bringing the action in a superior court.

As to the first ground, it appears that the plaintiff was arrested whilst residing at a place called Lock's Bottom, less than twenty miles from the defendant's residence, and that she personated her sister, against whom a writ of ca. sa. had issued, and was in consequence taken instead of her sister to Maidstone Gaol, where she remained in custody until at and after the commencement of this action, which was brought to recover damages for such imprisonment.

It further appears, that, upon the plaintiff's discharge from custody, she returned to the same residence where she was dwelling at the time of the arrest, and (as sworn to by Chapman, and not denied by the plaintiff), long before that time. The plaintiff, with full opportunity of explanation, does not enter into any particulars as to how long she had resided at Lock's Bottom, or with her sister, or where she had previously resided, or why she returned to that place as her place of residence after she was discharged out of custody, or why she has continued to

dwell there since; and she contents herself with swearing, in the most general terms, that that was not her residence, that she was only a visitor, and that in fact she had no residence except Maidstone Gaol.

In this state of facts, the question arises, whether she is to be considered as dwelling at Maidstone Gaol, *within the meaning of
 *278] the statute, at the time the action was commenced; for, if not, she did not dwell at any other place more than twenty miles from the defendant. We are of opinion that the gaol was not a dwelling within the meaning of the act. The residence there was compulsory and temporary, without any intention on the plaintiff's part of remaining; but, on the contrary, with an intention, shown by the facts, of leaving it when she could, and returning to her former place of residence, whenever she was discharged out of custody.

The statute refers to the place in which the party dwells, as affecting the question of convenience to suitors in attending the county court, and therefore must mean by the word "dwelling" the *ordinary* dwelling of the party, and not a place like a gaol, where a person is temporarily detained,—it may be for a single day or night,—in custody.

The first ground, therefore, fails.

As to the other ground of the motion, namely, that there was sufficient reason for bringing the action in the superior court,—this must depend upon the importance of the action, and of the questions likely to be raised in it, upon which the judge who tried the cause, with all the facts fresh in his mind, twice refused, upon application by the plaintiff, to direct the costs to be paid, being then and still of opinion that there was not sufficient ground for bringing the action in a superior court.

If we were satisfied that the learned judge had acted upon an erroneous view of the facts or law of the case, we might review this exercise of his discretion. But, generally speaking, the judge who has tried the cause is best able to appreciate its character and fitness for a superior court: and we ought not to overrule his discretion, except upon much stronger grounds than have been brought forward here.

*The rule must, therefore, be discharged, and, being in effect
 *279] an appeal from a judge at Chambers, with costs.

Rule discharged, with costs.

Jan. 12, 1859. *Woollett*, in Michaelmas Term, obtained a rule calling upon the defendant to show cause why the master should not be at liberty to tax and allow to the plaintiff *her costs of the demurrer* upon which judgment was directed to be entered for her, and why such costs, when so taxed, should not be set off against the costs allowed to the defendant pursuant to the rule of the 5th of July last. He referred to the 34th section of the 3 & 4 W. 4, c. 42, (a) and to the case of *Bentley v. Dawes*, 10 Exch. 347.†

Montagu Chambers, Q. C., in Hilary Term, 1859, showed cause.—By the rule of Hilary Term, 1858, the plaintiff asked for the costs as well of the issues of law as of the issues in fact. The court upon that

(a) Which enacts, "that, where judgment shall be given either for or against a plaintiff or defendant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."

occasion dealt with and disposed of the whole matter. The point, therefore, now sought to be raised is not open to the plaintiff. But, supposing it were open, the point is clearly disposed of by an admirable judgment of Maule, J., in a case of *Abley v. Dale*, 11 C. B. 889 (E. C. L. R. vol. 73), which shows that the prohibition in the county court acts applies as well to issues of law as to issues of fact. That was an action of tort, in which there was an *issue of fact and an issue of law, both of which were determined in favour of the plaintiff, but the damages [*280 recovered were less than 5*l.*, and there was a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129; and it was held that the plaintiff was not entitled to *any costs*. Jervis, C. J., says: "It is unnecessary for us to consider the effect of either the 3 & 4 W. 4, c. 42, s. 34, or Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, because this turns upon a later act,—9 & 10 Vict. c. 95,—in which the legislature has in substance said, that, where the plaintiff has brought a frivolous action in the superior court, he shall have judgment to recover the amount of the verdict only, and *no costs*. I think we cannot give the plaintiff costs in any shape, without violating the act of parliament." And Maule, J., says: "In considering what is the proper effect and operation of the 129th section of the 9 & 10 Vict. c. 95, it is material to consider what are the words used, and what was the intention of the legislature. In this case there was an issue in law and an issue in fact, and both have been determined in favour of the plaintiff, but the jury have found that the plaintiff was entitled to less than 5*l.* damages. Now, the provision in the act is, that, if any action founded on tort, which is not within any of the exceptions, and for which a plaint might have been entered in the county court, shall be brought in a superior court, and a verdict shall be found for the plaintiff for a sum less than 5*l.*, the plaintiff shall have judgment to recover such sum only, and *no costs*. Construing these words according to their full literal and ordinary meaning,—which is the proper mode of construing acts of parliament, as well as other documents, unless there is some special reason for construing them otherwise,—these words do deprive this plaintiff of costs. The act in terms says that under these circumstances *he shall have no [*281 costs at all. It has been insisted, on the part of the plaintiff, that, regard being had to the subject-matter, and to the plaintiff's rights under prior statutes, these words require a more narrow construction, and must be taken to mean, no costs 'in respect of the trial or of the verdict.' That would, I think, be a very considerable stretch of interpretation. And, when we consider what was the general scope and intention of this act,—to discourage frivolous litigation in the superior courts,—I think it is impossible not to see that it was intended to apply to costs on demurrer as well as to other costs. The term 'no costs' is a distinct negation of every description of costs. The words are clearly comprehensive enough to embrace these costs. What, then, was the intention of the legislature? The general spirit of the act was, to provide competent tribunals for the trial of causes of small value, with greater speed and economy than was consistent with the constitution of the superior courts, and to impose a sort of penalty upon plaintiffs who unnecessarily resort to the more expensive tribunal. With certain exceptions, therefore, where the jury, in a case of this sort, find that the cause of action is of less value than 5*l.*, they find conclusively (and

the legislature, I apprehend, so intended), that the cause is not a proper one to be brought in the superior court; and that quite independently of the nature of the question to be tried. If the amount in dispute is so small that it is not fit that it should be made the subject of proceedings in the superior court, the plaintiff is treated as a person who has done wrong in bringing his action there. The plaintiff here says he is entitled to costs because he has by his demurrer raised a question of law upon which he has succeeded. But the answer to that is, that the question of law might have been disposed of in the county court: it is *282] perfectly competent *to a defendant or a plaintiff in the county courts to say that the plea is insufficient, or the plea no answer to the demand. I therefore think that the words as well as the intention of the legislature manifestly take away *all costs* under the circumstances which have happened here: and I think this decision is in perfect consonance with all the cases which have been cited." *Bentley v. Dawes*, 10 Exch. 347,† has no application: there, the action was properly brought in the superior court. [COCKBURN, C. J.—There is no more reason why a plaintiff should have the costs of an issue in law than those of an issue of fact. WILLES, J.—In *Burdon v. Flower*, 7 Dowl. P. C. 786, Coleridge, J., goes fully into the consideration of the 3 & 4 W. 4, c. 42, s. 34, and holds, that, where judgment passes for the plaintiff on a demurrer to one plea, and the cause is taken down for trial upon another, and a juror is then withdrawn by consent, the plaintiff is not entitled to costs of the demurrer. COCKBURN, C. J.—I do not see how it is possible to distinguish this case from *Abley v. Dale*, 11 C. B. 889 (E. C. L. R. vol. 73).]

Woollett, in support of the rule.—It must be conceded that *Abley v. Dale* is not distinguishable from the present case. But it is submitted that this case must be governed by the decision of the Exchequer in *Bentley v. Dawes*, 10 Exch. 347,† upon the argument of which *Abley v. Dale* was not referred to. It was there distinctly held, that, under the 3 & 4 W. 4, c. 42, s. 34, the successful party on a demurrer is entitled to his costs in that behalf, whatever may be the ultimate determination of the cause. In delivering judgment, Parke, B., said: "We have considered the question; and, although my Brother Platt is not, I believe, fully satisfied upon the point, the rest of the court are of opinion *283] that, under the statute 3 & 4 W. 4, c. 42, s. 34, which *gives to the successful party upon a demurrer his costs of that demurrer, the plaintiff has a right to these costs quite irrespective of the termination of the suit, and independently of the assessment of damages. The words of the statute are, that 'he shall have judgment to recover his costs in that behalf.' That right, therefore, is not affected by the ultimate determination of the suit." [COCKBURN, C. J.—The action there was, as Mr. *Chambers* has observed, properly brought in the superior court. CROWDER, J.—The reason why *Abley v. Dale* was not cited there probably was, that it was thought to have no application. WILLIAMS, J.—The 3 & 4 Vict. c. 24, s. 2, limits the deprivation of costs to the costs of the verdict. The County Court Act is general in its terms,—that, where in tort the plaintiff recovers a sum not exceeding 5*l.*, he shall have judgment to recover such sum only and *no costs*.(a) There is nothing in the County Court Acts to indicate any intention to repeal

(a) See 13 & 14 Vict. c. 61, s. 11.

the 3 & 4 W. 4, c. 42, s. 34. Reliance was placed, in the argument in *Bentley v. Dawes*, upon the 81st section of the Common Law Procedure Act, 1854, 15 & 16 Vict. c. 76, and upon the 62d rule of Hilary Term, 1853. [COCKBURN, C. J.—Jervis, C. J., in *Abley v. Dale*, expressly founds his judgment, not upon the 3 & 4 W. 4, c. 42, s. 34, or the 3 & 4 Vict. c. 24, s. 2, but upon the 9 & 10 Vict. c. 95.] Parke, B., in *Bentley v. Dawes*, distinctly says that the costs are given by the 3 & 4 W. 4, c. 42, s. 34, at the time the judgment is given on the demurrer. [CROWDER, J.—Were you entitled to costs immediately upon the judgment on the demurrer?] Yes, though, by reason of the practice of the court, the taxation was postponed. [CROWDER, J.—In *Abley v. Dale*, Cresswell, J., says: "If it had been necessary to decide this case with reference to the 3 & 4 W. 4, c. 42, s. 34, and the 3 & 4 Vict. c. 24, s. 2, a question of some nicety might have arisen. But I [*284 think the County Court Act, 9 & 10 Vict. c. 95, s. 129, relieves the case from all difficulty. Where the plaintiff in an action of tort recovers less than 5*l.*, the judgment is to be for the amount of the verdict only, and *no costs.*" I do not see how you can get over that.]

COCKBURN, C. J.—I am of opinion that this rule should be discharged. It is unnecessary for us to consider whether the decision of the Court of Exchequer in *Bentley v. Dawes*, 10 Exch. 347,† or that of Coleridge, J., in *Burdon v. Flower*, 7 Dowl. P. C. 786, was the more correct exposition of the law, because, as was pointed out in *Abley v. Dale*, 11 C. B. 889 (E. C. L. R. vol. 73), the question does not turn upon the language of the 3 & 4 Vict. c. 24, but upon that of the County Court Act: and, as is well observed in that case, the latter act takes away *all* costs in the event provided for. Mr. *Woollett* was obliged to confess that he was unable to distinguish the present case from *Abley v. Dale*. The facts are precisely the same. And I think the decision is founded upon sound and correct principles.

WILLIAMS, J.—The principle upon which the judgment of this court in *Abley v. Dale* proceeded, is, that the County Court Acts contain a general prohibition against the plaintiff having costs in the cases provided for, and are not, as is the 3 & 4 Vict. c. 24, limited to the costs consequent upon the verdict. The question does not appear to me to be at all affected by the Common Law Procedure Act. That being so, we are left with the decision of this court in *Abley v. Dale*: and we are disposed to abide by it.

CROWDER, J.—I am entirely of the same opinion as *my Lord* [*285 and *my Brother Williams*. *Abley v. Dale* seems to me to be [*285 conclusive of the question. That case, as this, arose upon the County Court Act. It is a decision precisely in point: and I entirely agree with the reasons expressed by the court. We are referred to the conflict of authorities between the Queen's Bench and the Exchequer: but I desire to give my opinion entirely and solely upon the construction of the County Court Act. I think the rule must be discharged.

WILLES, J.—I am of the same opinion. It appears to me that the costs under the 3 & 4 W. 4, c. 42, s. 34, are the same as those under the 8 & 9 W. 3, c. 11, s. 3, and not, as has been contended on the part of the plaintiff, interlocutory costs, but costs which are to be taxed on the final result of the cause. If so, the decision of the Court of Queen's Bench in *Burdon v. Flower*, 7 Dowl. P. C. 786, was right, and that of

the Court of Exchequer in *Bentley v. Dawes*, 10 Exch. 347,† not to be sustained. See Archbold's Practice, 9th edit., by Prentice, 872. However far I am from desiring to put my opinion in opposition to a decision of the Court of Exchequer, I think it right to say that I am not satisfied with *Bentley v. Dawes*, and that it seems to me that the doubt expressed by one member of the court was well founded. As to the other point, I cannot entertain a shade of doubt. Besides, this rule is in effect to reopen a matter which was settled and disposed of by the former rule. It is, therefore, a vexatious proceeding, and the rule must be discharged with costs.

Rule discharged, with costs

***286] *JOHNSON, Appellant, COCKSEGE, Respondent. June 24.**

By a local turnpike act (10 G. 4, c. cxxiii.), the road was divided into three separate districts or divisions, a different set of trustees being appointed for each. The 14th section enabled "the said trustees," or any person or persons by them appointed, to demand and take, at the turnpikes or gates erected or to be erected by virtue of the act, amongst others, a toll of 4½d. "for every horse, &c., drawing any wagon, &c., with four wheels, having the fellys of the wheels thereof of the breadth or gauge of 4½ inches." The 15th section provided that any person having paid the toll for the passing of any horse, carriage, &c., upon producing a ticket should be permitted to pass and repass toll-free through the same gate or through such other gate or gates (if any) as the ticket for such payment should free, at any time during the same day. And a 16 enacted "that no more than one full toll should be demanded or taken for or in respect of the same horses, &c., for passing on the same day through all or any of the toll-gates, &c., along the whole line of the said roads:"—Held, that a single toll of 4½d. paid for passing a toll-gate in one of the three districts or divisions cleared all the gates in the three districts.

THE following case was stated for the opinion of this court, pursuant to the statute 20 & 21 Vict. c. 43, by way of appeal against a conviction by three justices of the peace acting in and for the liberty of St. Alban's, in the county of Hertford.

On the 10th of November, 1857, Joseph Johnson, of Rickmansworth, in the said liberty of St. Alban's, appeared before certain justices of the peace acting in petty sessions, at Watford, in and for the said liberty, of whom the above-named justices formed the majority, to answer the information and complaint of George Cocksege, of Watford aforesaid, superintendent of police, who complained that he the said Joseph Johnson, on the 30th of September, 1857, at the parish of Rickmansworth aforesaid, in the liberty aforesaid, being then and there the collector of tolls at a certain toll-gate there, commonly called or known as Chorley Wood gate, on a certain turnpike-road from Reading, in the county of Berks, to Hatfield, in the county of Hertford, did demand and take from one Joseph Flexman, of Watford aforesaid, corn-dealer, the sum of 4½d. as and for toll for a horse and cart then and there driven by the said Joseph Flexman, and being his own property, for passing through the said gate, he the said Joseph Flexman having previously on the same day paid the like sum as and for toll authorized by law to be taken

*287] *at a certain other gate commonly called or known as Hagden Lane gate, in the parish of Watford aforesaid, on the same road, for the passing of the same horse and cart through Chorley Wood gate aforesaid; the said Joseph Flexman having at the gate last aforesaid, and on the day last aforesaid, produced to him the said Joseph Johnson

a ticket previously and on the said last-mentioned day received by the said Joseph Flexman at Hagden Lane gate aforesaid from the toll-collector there, denoting the payment of such toll thereat on that day; contrary to the form of the statute in such case made and provided.

The above information was laid under the General Turnpike Act. -3 G. 4, c. 126.

On the hearing of the information, it was found, that, on the morning of the said 30th of September, 1857, the said Joseph Flexman passed through the said Hagden Lane gate, on the Reading and Hatfield turnpike-road, in a horse and cart, and there paid the toll demanded of him by the toll-collector at that gate, and which was admitted to be the legal toll payable by him in respect of the said horse and cart; and he received from such collector a ticket in the form and words following:—

HAGDEN LANE GATE,

Sept. 30th.

No. 9.

On the same day, and on the same turnpike-road, the defendant Joseph Flexman passed through another gate called Chorley Wood gate, where the defendant Joseph Johnson was the collector of tolls, who demanded of him the said Joseph Flexman another sum of $4\frac{1}{2}d.$ for toll, and which the latter refused to pay, contending, that, *having already paid the toll of $4\frac{1}{2}d.$ at Hagden Lane gate, he [*288 was entitled to pass through Chorley Wood gate free.

The last-mentioned sum was paid by the said Joseph Flexman after further dispute.

The power to collect tolls on the said turnpike-road is given by an act of parliament passed in the tenth year of the reign of G. 4 (declared to be a public act), intituled "An act for more effectually repairing and improving the road from Reading, in the county of Berks, to Hatfield, in the county of Hertford, and also the road leading out of the said road at Marlow to or near the thirty-mile stone in the turnpike-road from Maidenhead to Reading."

By one section of that act (the 14th), it is enacted as follows:—"That it shall be lawful for the trustees named therein, or such person or persons as shall be by them appointed, to demand, receive, and take, at the turnpikes or toll-gates, side-bars, or chains now erected and to be continued, or hereafter to be erected by virtue of this act, the several tolls and duties hereinafter mentioned,"—amongst which said tolls and duties is specified the following toll,—“For every horse or beast of draught drawing any wagon, wain, cart, or other such like carriage, having the fellies of the wheels thereof of less breadth in gauge than four inches and a half, the sum of $4\frac{1}{2}d.$ ”

By the next following section of the same act (the 15th), it is enacted as follows:—"That, if any person shall have paid the toll hereby authorized to be taken for the passing of any horse or horses, cattle, beast, carriage, or carriages through any of the turnpikes, toll-gates, side-gates, or bars continued or to be erected by virtue of this act, the same horse or horses, cattle, beast, carriage, or carriages shall, upon a

ticket denoting the payment thereof on that day being produced, be
 *289] *permitted to pass and repass toll-free (except as hereinafter particularly mentioned) through the same toll-gate, turnpike, side-gate, or bar, and also through such other gate or gates (if any) as the ticket for such payment shall free, at any time during the same day (such day to be computed from twelve of the clock at night to twelve of the clock in the next succeeding night), anything herein contained to the contrary thereof in any wise notwithstanding."

And by the next following section of the same act (the 16th), it is then further enacted as follows:—"That no more than one full toll shall be demanded or taken for or in respect of the same horses, beasts, or cattle (except as hereinafter mentioned,(a)) for passing on the same day (such day to be computed as aforesaid) through all or any of the toll-gates, turnpikes, or side-gates along the whole line of the said roads."

The said gates called respectively the Hagden Lane gate and the Chorley Wood gate had been erected before the passing of the said act, and were continued thereby; and the tolls and duties authorized by the said act to be taken were and are continued to be taken after the passing of the said act up to the present time.

It was contended, on the part of the complainant, that, under the last-recited section (the 16th) of the said act of parliament, no more than one full toll could under any circumstances be taken for the passing of the same horses, beasts, or cattle on the same day through any toll-gate on the above-mentioned line of road, or, in other words, that payment at one toll-gate for the passing of any horse or beast of draught cleared the whole of the toll-gates and side-bars on the said line of road through which the same horse, &c., might pass on the same day; and
 *290] that the said Joseph *Johnson was not authorized by law to demand and take of the said Joseph Flexman the said sum of 4*1*/*d*. at Chorley Wood gate aforesaid, he having already paid the gate toll for the passing of the same horse and cart on the same day at Hagden Lane gate, on the same line of roads.

The whole length of the said turnpike-road is fifty-six miles, and on it there are ten toll-gates, besides side-bars.

The above-recited act of parliament, 10 G. 4, authorizing tolls to be taken, is a renewal or substitution of acts of parliament passed respectively in the 8 G. 3 (c. i.), 27 G. 3 (c. lxxxi.), and 49 G. 3 (c. xcvi.), and which were severally repealed by that the last act. In none of the repealed acts is there any clause similar to the 16th clause of the act of 10 G. 4 herein last recited, limiting the number of tolls to be taken on the same day.

Considerable sums of money were borrowed before the passing of the existing act of parliament, and are still due and secured upon the tolls authorized to be taken on the turnpike-road in question.

Upon the above facts, and upon a consideration of the last-recited clause, the justices did determine that only one toll was payable by the said Joseph Flexman, and therefore convicted the said Joseph Johnson in a nominal penalty of 1*s*. and 1*l*. 15*s*. 8*d*. costs.

The question for the opinion of the court is, whether, upon the facts stated, the said conviction is right in law and in fact.

(a) Which exception did not affect the case.

Manisty, Q. C. (with whom was *Lawrence*), for the appellant.—The question turns mainly upon the construction of the 14th, 15th, and 16th sections of the 10 G. 4, c. cxxxiii., an act for repairing and improving the road from Reading to Hatfield. The 7th section of *the act recites, that, in consequence of the great extent of the said road [*291 (fifty-six miles, with ten toll-gates), it was expedient and necessary that the same should be divided into districts, and then it proceeds to enact that the roads thereby directed to be repaired shall be divided into three separate districts or divisions; and the trustees, who are appointed by s. 5, are expressly appointed trustees for carrying the act into execution, so far as the same related to the first, second, and third districts respectively. (a) The 14th section enacts "that it shall be lawful for the said trustees, or such person or persons as shall be by them appointed, to demand, receive, and take, at the turnpikes or toll-gates, side-bars, or chains now erected and to be continued, or hereafter to be erected by virtue of this act, the several tolls and duties hereinafter mentioned, that is to say (amongst others),—For every horse or beast of draught drawing any wagon, wain, cart, or other such like carriage with four wheels, having the fellies of the wheels thereof of the breadth or gauge of four inches and a half, the sum of 4½d." That is an absolute and unconditional power to receive tolls. The *15th section provides [*292 and enacts, "that, if any person shall have paid the toll hereby authorized to be taken for the passing of any horse or horses, cattle, beast, carriage, or carriages through any of the turnpikes, toll-gates, side-gates, or bars continued or to be erected by virtue of this act, the same horse or horses, cattle, beast, carriage, or carriages, shall, upon a ticket denoting the payment thereof on that day being produced, be permitted to pass and repass toll-free (except as hereinafter particularly mentioned) through the same toll-gate, turnpike, side-gate, or bar, and also through such other gate or gates (if any) as the ticket for such payment shall free, at any time during the same day, such day to be computed from twelve of the clock at night to twelve of the clock in the next succeeding night; anything herein contained to the contrary thereof in anywise notwithstanding." Then comes the 16th section, which gives rise to the whole difficulty: it enacts, "that no more than one full toll shall be demanded or taken for or in respect of the same horses, beasts, or cattle, except as hereinafter mentioned, (b) for passing on the same day (such day to be computed as aforesaid) through all or any of the toll-gates, turnpikes, or side-gates along the whole line of the said roads." The question is, whether that means that the payment of one toll in district A. shall clear the gates in districts B. and C., or

(a) "All his Majesty's justices of the peace for the time being acting for the counties of Berks, Bucks, Oxford, and Hertford, together with A., B., C., &c., shall be and they are hereby appointed the trustees for carrying this act into execution, so far as the same relates to the first district of the said road; and all his Majesty's justices of the peace for the time being acting for the said counties of Berks, Bucks, Oxford, and Hertford, together with D., E., F., &c., shall be and they are hereby appointed the trustees for carrying this act into execution, so far as the same relates to the second district of the said roads; and all his Majesty's justices of the peace for the time being acting for the said counties of Berks, Bucks, Oxford, and Hertford, together with G., H., I., &c., shall be and they are hereby appointed the trustees for carrying this act into execution, so far as the same relates to the third district of the said roads."

(b) The exceptions are, the same horse, &c., drawing a different wagon or carriage, s. 17; and stage-coaches, or post-chaises with a fresh hiring, s. 18.

whether it means that there shall not be more than one full toll taken for passing through any of the gates in the manner mentioned in ss. 14 and 15. If the former be the true construction of the 16th section, the 15th section is altogether destroyed; there is no necessity for any ticket at all. The court will give effect to the general intention of the *293] legislature, taking *all the clauses together. [WILLIAMS, J.—The difficulty is in grammatically construing the words imposing the tax.] The 14th section gives the right to take the toll at every gate, and each time of passing through. [WILLIAMS, J.—Not necessarily.] The 15th section evidently was intended to put a limit upon what might otherwise have been done under s. 14. The question is, whether the trustees acting for one district are empowered to issue tickets to free gates in the other two districts.

D. Seymour, contra.—The division into districts is for the convenience of management only, and not with a view to the imposition or collection of tolls: this abundantly appears from the 8th, 9th, and 10th sections, which speak of meetings to be held and acts to be done by “the trustees for all the said districts, or any five or more of them.” The power given by s. 14, is, to demand and receive tolls at the turnpikes, not at *each* of them. Suppose there were three gates; the maximum toll allowed to be taken being 4½d.; and 3d. is taken at gate A., and 1½d. at gate B.,—would not that entitle the traveller to pass through gate C. without paying a further toll on the same day? Having paid 3d. for gate A., the party would be entitled to repass that gate, by s. 15. Having paid an additional 1½d. for gate B., by virtue of ss. 15 and 16 he would be entitled to pass and repass all the gates on the line. If the argument on the other side be tenable, the trustees would be entitled to demand 4½d. for passing and repassing each of the ten gates, or, at all events, for passing and repassing through the several gates of each district or division. This would be to deprive the 16th section of any effect whatever. [WILLIAMS, J.—I must confess I do not see why a ticket given at one gate, one full toll having been paid, should not, under ss. 15 and 16, free the traveller passing and repassing all the gates on the line.]

*294] **Manisty*, in reply.—The trustees have no power to subdivide the toll, taking part at one gate and part at another. [WILLIAMS, J.—They would have a general power to regulate the tolls by the 3 G. 4, c. 126.] To reduce, but not to subdivide. [WILLIAMS, J.—What is the meaning of “one full toll?” Does it not imply that there may be tolls which are not “full tolls?” CROWDER, J.—Who are the trustees spoken of in s. 15?] The trustees appointed by s. 5. “The said trustees” must mean the trustees acting within each district: those appointed for the first district have no power to act in the second and third districts. It is as if there had been three separate trusts. [WILLIAMS, J., referred to *Hopkins v. Thorogood*, 2 B. & Ad. 916. By a turnpike act, a certain toll was to be taken at every turnpike on the roads from W. to O. for four horses drawing any carriage, &c.: a subsequent section provided that no person should pay toll more than once in the same day for passing or repassing with the same horses or carriages through any of the turnpikes, but that every person, after having paid toll once, and producing a ticket, should pass with the same horses and carriages toll-free during such day: and it was held that a second toll was payable for passing on the same day two toll-gates on the road with the same car-

riage, but drawn by different horses; for, that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment.] Every toll must be single and uniform.

WILLIAMS, J.—I am of opinion that the conviction in this case must be confirmed. There certainly is considerable difficulty in reconciling the 16th section of this act of parliament with the provisions of the 15th. But we are bound to consider this act as a *re-enactment of the [*295 former acts respecting the same road;(a) and we find that the new act for the first time introduces this clause. We have, therefore, to construe an enactment which the legislature has intended not as part of a general act, but an addition to the then governing statute. The ordinary natural and grammatical construction of the clause is plain: it says, in language which admits of no doubt, that “no more than one full toll shall be demanded or taken for or in respect of the same horses, beasts, or cattle, for passing on the same day through all or any of the toll-gates, turnpikes, or side-gates along the whole line of the said roads.” That is a plain and positive enactment that only one full toll shall be taken along the whole line. The question is, whether the difficulty of reconciling that section with the language of the 15th is enough to justify us in altogether rejecting it, and declining to give it any operation whatever. It is not merely that this is the natural and grammatical construction of the section: but there is no other possible construction which can be suggested, so as to give it any effect at all; for, if it be held to mean one full toll at any one gate, that is already provided for by s. 14. In effect, we are asked to decline altogether to give effect to s. 16. I find that this is by no means a new clause with reference to acts of parliament of this description. There was a similar one in the act upon which the question in *Hopkins v. Thorogood*, 2 B. & Ad. 916, arose. In the course of the argument, my Brother Willes called for a volume of the local and personal acts of about the period, and he there finds an act,—the 4 G. 4, c. cix.,—which provides (s. 16) “that no person shall be liable to the payment of more than *two full tolls* for passing or repassing, with the same horse, beast, cattle, or carriage on the same day (such day to *be computed from twelve of the clock at night [*296 to twelve of the clock in the next succeeding night), through *all the gates* or turnpikes erected or to be erected on the whole length of the said road, and that only *one toll* shall be taken at any time or times during the same day *at the same gate* for or in respect of the same horse, beast, cattle, or carriage, upon a ticket being produced denoting such payment having been so made for and in respect of the same on that day.” And in the same volume I find another act,—4 G. 4, c. civ.,—which contains a section (s. 20) in a similar manner limiting the number of tolls to be taken on the whole line of roads. It is obvious, therefore, that the legislature in passing these acts has thought it right to make a provision for one or more tolls clearing the whole line of road over which the trustees have control. I do not think we should be justified in rejecting so positive an enactment as that contained in the 16th section of this act, because we find it difficult to reconcile it with the 15th section.

CROWDER, J.—I am entirely of the same opinion, though I must cou-

(a) 8 G. 3, c. i.: 27 G. 3, c. lxxxi.: 49 G. 3, c. xcv.i.

fess I have arrived at this conclusion after very considerable hesitation. The 16th section, looked at alone, is free from ambiguity. The intention of the legislature is there fully and clearly expressed, viz., that there shall be but one single maximum toll. The embarrassment arises from the 15th section, which it seems difficult to construe together with the 16th. It may be that there might be a reduced toll imposed which at certain portions of the line of road might be so applied that a person might pay such reduced toll twice over and yet not pay more than one "full toll." Putting the construction we do upon the 16th section, I do not see how there can by reason of the 15th section be any ticket for *297] a full toll that will not clear the *whole line. We cannot, in order to give effect to s. 15, alter the words of s. 16. Upon the whole, I think it is manifest that the legislature intended that there should be but one full toll for traversing the entire line of road.

WILLES, J.—I am of the same opinion. From my recollection of the mode of framing these acts, and looking at the acts of parliament to which my Brother Williams has referred, and which contain sections similar to the 16th section of this act, I find this to be a very common provision. In all the acts a distinction is made between passing and repassing; and a provision similar to that of the 15th section here is generally introduced for the purpose of freeing parties from toll for repassing through the same gate. Clauses similar to the 16th are also found in the 4 G. 4, c. cv. s. 17, and the 4 G. 4, c. cviii. s. 16. In those provisions which are parallel to the 16th section here, the payment must be intended to clear more than the particular gate. With the light thrown upon the subject by what the legislature appear to have done upon so many other occasions, I think it is abundantly clear that by payment of one full toll the respondent became entitled to pass through every gate on the line. Reading "full" as "maximum," if the trustees charge the utmost the act authorizes at one gate, they cannot be entitled to claim an additional toll at any of the other gates; though, if a portion only be charged at one gate, they may possibly be entitled to charge up to the maximum at another gate. One impression which I received during the course of the argument,—and it is an impression I have not quite got rid of,—is, that the 16th section may be read as empowering the traveller to pass along the whole line of road, but not to repass. If so, then the 15th section (which relates to repassing) may *298] *possibly be reconciled with the 16th. Upon the whole, I agree with my learned Brothers that the decision of the justices was correct, and that their decision must be affirmed with costs.

Decision affirmed, with costs.(a)

(a) See *Ekin v. Flag*, 1 New Sessions Cases, 561. By a local turnpike act (4 Vict. c. xx. s. 8), tolls are made payable on horses. By s. 11, it is provided, that, "except as hereinafter provided to the contrary," only one full toll shall be payable for horses passing and repassing once in the same day. By s. 12, "all horses, &c., except horses or cattle drawing any stage-coach, wagon, or other stage-carriage," returning the same day, shall, on the production of a ticket denoting payment, pass toll-free. By s. 13, no horse which shall have paid the toll once, shall be permitted to return toll-free when drawing "another or different wagon, wain, cart, or other such carriage." By sect. 14, horses drawing any post-chaise or other carriage travelling for hire shall pay as often as a new hiring takes place. S. 15 provides that no additional toll shall be payable in respect of any stage-coach which shall be freed by such ticket on account only of their conveying other passengers, or of the horses or cattle drawing the same having been changed. It was held, that, in respect of the same horses passing through the toll-gate with a stage-coach, and returning the same day with a different stage-coach and passengers, only a single toll for each horse was payable, the horses and both coaches belonging to the same proprietor.

***BENJAMIN v. ANDREWS. June 22. [*299**

To entitle a party to exemption from penalties for an offence against the Hawkers' Act, 50 G. 3, c. 41, on the ground that the place where he exposed his wares for sale was a public market, it must be shown that it was a legally established market,—by grant from the Crown,—and not merely a market *de facto*.

THIS was an action for assaulting and imprisoning the plaintiff under pretence of his having been guilty of an offence punishable by law. Plea, “not guilty, by statute,”—the statute mentioned in the margin being the 50 G. 3, c. 41, ss. 20, 24. Issue thereon.

The cause was tried before Williams, J., at the first sitting in London in Easter Term last. The facts were as follows:—The plaintiff was an unlicensed hawker, and was in the habit of attending fairs and markets for the sale of goods. On Saturday, the 16th of January last, he was following his occupation in the market-place in Woolwich, when the defendant, a shopkeeper in the town, gave him into custody for trading without a hawker's license, and caused him to be carried before a magistrate. He claimed to be within the exemption of the 5th section of the 50 G. 3, c. 41, (a) on the ground that the place where he was selling his wares was a legally established market. The magistrate thereupon discharged him.

On the part of the defendant, it was insisted that the Woolwich market-day was Friday, and not Saturday: and letters patent of James the First were produced, whereby a market was granted to those under *whom Sir Thomas Wilson held. to be holden on Friday in every [*300 week; and it was shown by the evidence of Sir Thomas Wilson's Steward, that, upon the spot where the market had formerly been held, and which was changed in the year 1843, a board had stood for many years, upon which the tolls for standings were painted, and which stated the market-day to be Friday.

On the part of the plaintiff, evidence was given showing that for the last twenty or twenty-five years a market had *de facto* been held every day, and particularly on Saturday, and that the owner of the land, Sir Thomas Wilson, was in the habit of receiving toll every day, as well as Friday, from the plaintiff and others who like him frequented the market.

The learned judge left it to the jury to say,—first, whether there was a market *de facto* held on every day of the week besides Friday, and particularly on Saturday,—secondly, whether they would presume from the evidence a grant from the Crown to hold the market on every day,—thirdly, whether they were satisfied that a market had been held on the Saturday, as of right, for more than twenty years.

The jury found that there had *de facto* been a market held on the Saturday for more than twenty years, but that there was no evidence from which they could presume a grant for that purpose: and they returned a verdict for the plaintiff, damages 20*l*.

(a) Which enacts “that nothing herein contained shall extend, or be construed to extend, to hinder any person or persons from selling or exposing to sale any sorts of goods or merchandise in any public mart, market or fair legally established within the kingdom of England, dominion of Wales, and town of Berwick-upon-Tweed, but such person or persons may do therein as they lawfully might have done before the making of this act; anything herein contained to the contrary notwithstanding.”

Parry, Serjt., on a subsequent day in the same term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a nonsuit [CROWDER, J., referred to *Jenkins v. Harvey*, 2 C. M. & R. 393.†]

Skinner, Q. C., and *Kemplay*, now showed cause.—The question is whether the defendant was justified in causing the plaintiff to be apprehended under the *Hawkers' Act: and that will depend upon *301] whether or not the place where the alleged offence was committed was a market legally established within the meaning of the 5th section of the act. The act is a highly penal one, and must be construed strictly. Now, it is impossible that a man who frequents a market can know whether it is held under a legal grant or not. There was abundant evidence that the Saturday's market had existed for from twenty to twenty-five years; and the jury found that that was established. It is submitted that that which was recognised and carried out practically as a market, must, for the purposes of this act, be assumed to have had a legal origin. In *Holcroft v. Heel*, 1 Bos. & P. 400, it was held, that, if the grantee of a market under letters patent from the Crown suffer another to erect a market in his neighbourhood, and use it for the space of twenty-three years without interruption, he is by such user barred of his action on the case for disturbance of his market. [WILLIAMS, J.—Referring to that case, *Le Blanc, J.*, in *Campbell v. Wilson*, 3 East 302, says: "In the case of *Holcroft v. Heel*, the Court of Common Pleas thought the adverse possession for above twenty years so strong evidence that the Chief Justice ought to have left it to the jury to find a grant of the market from the Crown."] If the evidence was such as would have justified the jury in presuming a grant, the learned judge should have told them to do so: *Jenkins v. Harvey*, 1 C. M. & R. 877;† *Gibson v. Doeg*, 2 Hurlst. & N. 615.† [WILLIAMS, J.—If I was wrong, you should not have taken a verdict: you should have complained of my direction. I cautioned you, and I left it upon Lord Tenterden's Act, 2 & 3 W. 4, c. 71, according to your wishes. [BYLES, J.—*Jenkins v. Harvey*, 1 C. M. & R. 877,† seems to show that this case was correctly left to the jury.] Then, the arrest of the plaintiff *302] was altogether illegal and *unwarranted by the act. The offence with which the plaintiff was charged was punishable by a fine of 10*l.* under s. 17, which enacts "that, if any such hawker, &c., shall trade as aforesaid without, or contrary to, or otherwise than as shall be allowed by such license, such person shall, for each and every such offence, forfeit the sum of 10*l.*, to be recovered and applied as hereinafter mentioned; and that, if any person trading under or by virtue of any license to him or her granted as aforesaid, upon demand made by any person or persons authorized or appointed to demand any such license by the commissioners for licensing hawkers, &c., for the time being, or any two of them, under their hands and seals, and upon producing or showing such authority or appointment to such person so trading as last aforesaid, or upon demand made by any justice of the peace, mayor, constable, or other officer of the peace of any county, &c., or place where he or she shall so trade, or by any officer of the customs or excise, or by any person to whom such hawker, &c., shall offer any goods for sale, shall refuse to produce and show his or her license for so trading as aforesaid, or shall not have his or her license ready to produce and show unto such person authorized or appointed as last aforesaid

said, or unto such justice of the peace, &c.,—that then the person so refusing or not having his or her license ready to produce and show as aforesaid, shall forfeit 10*l.*, to be recovered and applied as thereafter mentioned, and, for non-payment thereof, shall suffer as a common vagrant, and be committed to the house of correction." The 18th section imposes a penalty of 300*l.* for forging or counterfeiting a license. The 19th section imposes a penalty of 40*l.* for borrowing or lending a license. Then comes s. 20, which enacts, "that it shall be lawful for *any person or persons whatsoever* to seize and detain any such hawker, &c., who shall be found **trading* without a license contrary to this act, or [**303* who, being found trading, shall refuse or neglect to produce to such person or persons a license according to this act, after being required so to do, for a reasonable time, in order to give notice to a constable, &c., who are hereby required to carry such person so seized, unless they shall in the mean time produce their respective licenses, before some one of his Majesty's justices of the peace of the county or place where such offence or offences shall be committed, which said justice of the peace is hereby authorized and strictly required to examine into the fact or facts charged; and upon the proof, either by confession of the party offending, or by the oath of one or more credible witness or witnesses (which the said justice is hereby empowered to administer), that the person so brought before him had so traded as aforesaid, and no such license being produced by such offender before the said justice, to convict the offender so trading without a license; and thereupon it shall be lawful for such justice, and he is hereby required, by warrant under his hand and seal, to cause *the said sum of 40*l.** to be levied by distress and sale of the goods, wares, or merchandise of such offender or offenders, or of the goods which such offender or offenders shall be found trading [with] as aforesaid, rendering the overplus, if any be, to the owner or owners thereof, after deducting the reasonable charges for making such distress, and out of the said sale to pay the said respective penalties and forfeitures aforesaid, and in the mean time to commit such offender to the common gaol or house of correction for the county, &c., where the said offence shall be committed, there to remain until the said penalties and forfeitures, and the reasonable charges of taking the said distress, shall be levied by such distress and sale as aforesaid, or until the same shall be otherwise paid or satisfied by **such offender*." That in terms applies only to the penalty mentioned in s. 19, and not to that imposed by s. 17. [*W. C. [*304 Harrison*.—In *The King v. M'Gill*, 2 B. & C. 142, 3 D. & R. 377 (E. C. L. R. vol. 16), Bayley, J., intimates that this was a mere mistake, and that the sum in the 20th section should have been 10*l.*, and not 40*l.*] That case is in reality an authority in the plaintiff's favour. [*WILLIAMS, J.*—It is impossible to apply the 20th section to the offence described in s. 19.]

Parry, Serjt. (with whom were *Hawkins* and *W. C. Harrison*), was stopped by the court.

WILLIAMS, J.—I regret to say that I entertain no doubt that this rule must be made absolute. Two questions arise,—first, whether the plaintiff is protected from incurring a penalty which he would have incurred upon the facts, if the provision contained in the 5th section of the 50 G. 3, c. 41, had not been there, by reason of his having hawked,

sold, and exposed goods in a market legally established; and upon that the only question is whether the Saturday market where he did so was a legally constituted market within the act. It is clear that it was a market *de facto*: and it certainly is extremely hard that a hawker, who has no means of knowing whether the market is rightfully held or not, should be subjected to the highly penal consequences imposed by this act because some person has chosen to exercise a right which the law does not give him. But, on the other hand, it would equally be unjust that unlicensed persons should be permitted, to the detriment of the shopkeepers in the neighbourhood, to carry on their dealings in a place where there is no pretence for saying that a market is held with any colour of right at all. Upon the whole, I think, we are driven to give

*305] the words their ordinary *and natural construction, and to hold that a market legally established must be a legal market, and that those words are not satisfied by showing a market *de facto*. That being so, the only question is whether this was a legal market. Now, a market cannot be a legal market without a grant. Here, the jury negatived any grant authorizing the Saturday market. That is the result of their finding. They also found that there had been an enjoyment as of right for more than twenty years, if Lord Tenterden's Act was applicable. But that was considered, and very properly so, not to be an arguable point. That finding, therefore, became inefficacious. The course taken at the trial was this,—The plaintiff insisted that he was entitled to a verdict. Several objections were urged against it; and I left three questions to the jury, upon which they found,—first, that there was a market *de facto*,—secondly, that there was no grant,—thirdly, that there had been an enjoyment as of right for more than twenty years; and they assessed the damages at 20*l*. I thereupon directed a verdict to be entered for the plaintiff, with liberty to the defendant to move to enter the verdict for him if the court should think the action not maintainable. If the learned counsel for the plaintiff had conceived that he was prejudiced by the way in which the case was left to the jury, or with the mode of dealing with the verdict, they should have asked to have the verdict entered the other way, with leave to them to move, or they might have come with a cross-motion. No such course, however, was taken; and all that remains for us now is, to say whether upon this finding the defendant is entitled to have the verdict entered for him. The court being of opinion that the defendant is entitled to a verdict, it becomes immaterial to consider whether there was any misdirection, or any failure of justice through the finding of

*306] the jury; though I do not think there has been either. Mr. **Skinner* put forth the facts and the law very clearly to the jury, telling them that they might presume a grant, if they found nothing inconsistent with it, observing upon the long exercise of the right without resistance, and freely canvassing the conflicting evidence: and I certainly aided the plaintiff's case as much as I thought I ought to do, and directed the jury exactly in accordance with the view which the learned counsel had presented. The remaining question is, whether the defendant had any authority under the act of parliament to apprehend the plaintiff. Unquestionably the 20th section is very clumsily drawn; for, not only is there the blunder of inserting 40*l*., when the context would lead to the inference that 10*l*. was intended, but it begins by

enacting that it shall be lawful for any person or persons whatsoever to seize and detain any hawker, &c., who shall be found trading without a license, or who, being found trading, shall refuse or neglect to produce his license, and cause him to be carried before a justice; and then it goes on to say that the justice, upon proof that the person so brought before him had so traded as aforesaid, and no such license being produced, may convict the offender "so trading without a license," omitting the other alternative, or "refusing or neglecting to produce such license." Nothing can be more clumsy; and, if it rested upon that section alone, I must own I should have felt some difficulty in knowing how to deal with it, if it was not for the elaborate judgment of Bayley, J., in *The King v. M'Gill*, which shows that the 40*l.* was by mistake inserted instead of 10*l.* We must follow that decision. The consequence is, that the defendant had authority under s. 20 to cause the plaintiff to be arrested, and, there being no proof that this was a legal market, the plaintiff was not within the protection of the 5th section. The rule, therefore, must be made absolute.

*WILLES, J.—I am of the same opinion. I am not dissatisfied with the result at which the jury arrived; and, if I were so, it [*307 would be of no avail. They found that Sir Thomas Wilson had no grant enabling him to hold a market on the locus in quo upon the day in question. I think that, when we consider the statement made by Sir Thomas Wilson's agent as to the board, giving public notice of a market held on the Friday, and making no mention of any other, the fair and only conclusion that could be arrived at, was, that there was no grant but that which appeared. The absence of the circumstances I have referred to might have rendered it competent to the jury, upon the other evidence in the case, to presume a grant: but, with those circumstances, I think it would have been trifling with the truth to have come to any other result than they did. I feel so strongly the necessity of upholding rights the only evidence of which rests upon usage, that I am disposed to give every fair latitude to the mode of proof. But here I think there was no evidence upon which the jury could safely act. Lord Tenterden's Act is clearly inapplicable. Then, the plaintiff, an unlicensed hawker, being found trading in a place which was not a legal market, I am of opinion that the defendant was justified in causing him to be arrested under the 20th section of the 50 G. 3, c. 41. I feel all the difficulties which have been suggested as to the construction of that section. But these difficulties were met in the case of *The King v. M'Gill*, 2 B. & C. 142 (E. C. L. R. vol. 9), 3 D. & R. 377 (E. C. L. R. vol. 16), and also in *The King v. Webbsell*, 2 B. & C. 136, 3 D. & R. 360. The result of an elaborate discussion in those cases, is, that 40*l.* had crept into the 20th section by mistake instead of 10*l.* In the former acts upon the subject, there appear to have been parallel sections to the 17th and 20th, but none parallel to the 19th. Upon the authority, [*308 *therefore, of those cases, as well as upon the general principle that a false description should be rejected if there be sufficient without it to enable us to form a judgment, I am of opinion that the act of the defendant was justifiable, and that the rule to enter a verdict for him must be made absolute.

BYLES, J.—I am of the same opinion. I entertained some doubt at first whether the case was properly left to the jury: but I am now satisfied. VOL. V., C. B. (N. S.)—13

ified that it was properly left, according to the rule laid down by the Court of Exchequer in *Jenkins v. Harvey*: and, further, I think the jury came to the right conclusion. As to the construction of the 20th section of the 50 G. 3, c. 41, I agree with the rest of the court in thinking that 40*l.* was inserted per incuriam. It is impossible to come to any sensible construction upon it without doing some violence to its language. I think there has been no miscarriage, and that the jury arrived at a proper conclusion under a proper direction.

Rule absolute.

*309] **In the Matter of the Complaint of JOSEPH BAXENDALE and Others, carrying on Business under the Firm of Pickford & Co., Common Carriers, against THE GREAT WESTERN RAILWAY COMPANY. Nov. 9.**

[*Bristol Case.*]

It is not a legitimate ground for giving a preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question: and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business.

The complainants were common carriers from Bristol to London, using for that purpose the Great Western Railway. They were also common carriers from Bristol to various other places, using for that purpose lines in rivalry with the Great Western lines other than that from Bristol to London. One S., a paper-maker near Bristol, who was in the habit of sending large quantities of paper to London and also to the other places before mentioned, prior to August, 1857, employed the complainants to carry his paper to London and deliver it there; and the complainants employed the company to carry it on their railway from the station at Bristol (where it was delivered by S.) to the station at Paddington, whence it was carted by the complainants to its destination in London. The company's charge at that time was 22*s.* 1*d.* per ton,—being their rate for first class goods, less 1*s.* 6*d.* per ton for cartage to the station at Bristol, and 3*s.* 4*d.* per ton for cartage from the station at Paddington. The 1*s.* 6*d.* per ton was allowed to S., the paper being delivered at the station at Bristol by him; and the complainants made their profit upon the cartage in London. In August, 1857, the company raised their charge for this paper to 35*s.* per ton, being their rate for third class goods, less cartage. The complainants in consequence made a proportionate increase in their charge to S., who objected to it. The company declined to alter this charge; but they subsequently agreed with S. to carry his paper from the station at Bristol to London for 23*s.* 4*d.* per ton, *including cartage from Paddington*,—in order, as the complainants alleged, to induce S. to send his paper through them, instead of through the complainants, as formerly.

Upon a motion for an injunction under the Railway Traffic Act, 1854, the company sought to justify this preference by alleging, that they carried for S. upon the terms of a special agreement containing stipulations so much to their advantage as to be worth the whole difference of charge: that the rate of 23*s.* 4*d.* per ton was agreed upon for paper between Bristol and London (to include cartage in London, but not at Bristol); that the paper carried at that rate was to be at the risk of S., who was also to send all other goods he had to send, at the ordinary rates, by the company, and also to send all his goods (including paper) which were going to any place to which the company carried, by them; and that it was a great gain to the company, and a fair equivalent for the difference of charge upon the goods carried from Bristol to London, to have the advantage which they derived by securing the whole of S.'s traffic, or that in which he had any interest or could influence, to the north of England and elsewhere upon their lines other than between Bristol and London, together with the advantage of the goods being carried from Bristol to London at S.'s risk:—

Held, that the advantages thus stipulated for were wholly distinct from and did not affect the price or profit of the carriage from Bristol to London, and ought not to be taken into account in determining the charge for such carriage; and consequently, that the complainants were entitled to relief.

C. POLLOCK. in Easter Term last, obtained a rule on behalf of Messrs. Baxendale, calling upon the Great Western Railway Company to show cause why a writ of injunction should not issue against the company, pursuant to *the Railway and Canal Traffic Act, 1854, 17 & 18 [*310 Vict. c. 31, enjoining the said company to carry paper and other goods in their third class of goods for the complainants from Bristol to London at the same rates that they charged to one William Somerville; and also enjoining them to desist from charging William Somerville less for the carriage of paper from Bristol to London than they charged to other persons, and less than they charged for the carriage of other goods of the third class; and also enjoining them to desist from charging the said complainants more than they charged the said William Somerville for the carriage of paper manufactured by him and sent by him from Bristol to London,—with costs.

The affidavits upon which the rule was moved stated in substance as follows:—That the complainants carried on the business of common carriers, under the firm of Pickford & Co., between Bristol and London, employing for that purpose the railway of the Great Western Railway Company from Bristol to Paddington: That, amongst other goods which the complainants prior to October, 1857, were in the habit of sending by the said railway from Bristol to Paddington, was, certain paper manufactured by one William Somerville, at Bitton, near Bristol: That, prior to August, 1857, the company were in the habit of charging the complainants 22s. 1d. per ton for the carriage of the said paper, less 1s. 6d. per ton for cartage to the station at Bristol, and less 3s. 4d. for cartage from the station at Paddington; but in that month they increased their charge to 35s. per ton, less the said sums of 1s. 6d. per ton and 3s. 4d. per ton for cartage as aforesaid: That Somerville was in the habit of delivering the said paper to the company's station at Bristol, consigned to the complainants at Paddington, where the complainants received it, and carted it to the address of the consignees in London, charging *Somerville the same rate as the company charged [*311 them,—their only profit being, the deduction of 3s. 4d. per ton allowed by the company for cartage: That, in consequence of the company having raised their said rate as thereinbefore mentioned, the complainants were obliged to make a similar increase in their charge to Somerville: That Somerville having in September last complained to the agent of the complainants at Bristol of the increased rate charged, and having intimated, that, unless it was reduced, he should send his paper from Bristol by sea, instead of by railway, the complainants wrote to the company's goods manager on the 24th of October, 1857, as follows:—"We have been in the habit of forwarding a considerable quantity of paper from Bristol to Paddington: the weight averages about 240 tons annually, which until lately was charged by you at the first class rate, 22s. 1d. per ton; but, when the alteration in August took place, you commenced charging it at the third class rate, 35s. per ton, which we were of course obliged to charge to the sender, who now informs us, if not conveyed at the first class rate, he shall discontinue sending it by rail, as he can get it taken at a considerably less rate by sea. We shall be glad to know if, under the circumstances, you will consent to charge all future lots at the present first class rate, and thus keep the trade in the railway company's hands:" That the company

declined to reduce the charge: That the complainants having shortly afterwards learned that the company had reduced their rate to Somerville to 23s. 4d. per ton, including cartage from Paddington, in order to induce him to send his paper through the company, instead of through the complainants, as he had previously done, the complainants, on the 2d of December, 1857, wrote to the company, as follows,—“We have been much surprised to find that your Bristol district manager, after *312] refusing *to make any reduction in the rate charged to us for paper from Bristol to London, has gone behind our backs to our customer, Mr. Somerville, and made an arrangement with him to carry his paper at about 10s. per ton less than the company were in the habit of charging to us when Mr. Somerville employed us instead of you to cart it to London. We cannot suppose for a moment that the company will sanction such dishonourable as well as illegal conduct on the part of one of their managers; but, unless it is discontinued immediately, and we are allowed to carry Mr. Somerville's paper at the same reduced rate as you are now charging him, we shall place the matter in the hands of our solicitors, and instruct them to take legal measures to obtain compensation for the injury done to us, and to protect us from a repetition of it.” That, on the 4th of December, the complainants received a letter from the secretary of the company, as follows,—“I am desired to acknowledge the receipt of your letter of the 2d, addressed to the directors, upon which they will give their instructions at the next meeting of the board. As you acquaint them with your intention to resort to legal measures, they think it may be proper to refer your letter to their own solicitors before they reply to it:” That, on the 16th of December, the complainants received a further letter from the company's secretary, as follows,—“The directors of this company desire me to acquaint you, in reply to your letter of the 2d instant, that they must decline to lower any of their proper rates for the conveyance of goods, excepting in cases where a special agreement may enable the board to do so with mutual advantage, upon conditions to which both may assent. The board presumes that it is not your intention to undertake to transmit by this railway all the traffic which you can obtain for the places to *313] which this company are carriers, inasmuch *as they know that you are engaged in taking away by other lines as much as you can obtain and influence. If they are mistaken in this view, you will be kind enough to submit any proposal which may enable the board to enter into any special agreement with your firm, in consideration of which terms, it may be in their power to meet your request:” That, on the 21st of December, the complainants wrote to the company as follows,—“We have to acknowledge your letter of the 16th instant. In your reply, you seem altogether to overlook the fact, that, in charging us more than your other customers, you are acting illegally and in direct violation of the Railway Traffic Act; and, besides, even upon your own argument, we should be entitled to be put upon the footing we seek, as we not only use your line exclusively for our traffic between Bristol and London, but bring you as large a traffic between those points as any other person:” That, on the 2d of January, 1858, the company's secretary replied as follows:—“Your letter of the 21st ult. has been laid before the board. The directors can perceive no reason for altering their former decision upon the question raised: and they desire me to

inform you that they have no other reply to give to your communication: That the quantity of third class goods which the complainants sent from Bristol to London by the Great Western Railway Company in the course of every month considerably exceeded the quantity of paper sent from Bristol to London by Somerville through them in the same period: That the paper in question came within the description of paper mentioned in the third class of rates which before September last and since, and thence to the present time, had been in use by the company: That Somerville was in the habit of sending all his paper through the complainants by the Great Western Railway, and was willing and *desirous to continue to do so, if the company would charge the [*314 complainants the same rate as they charged him: That the paper now carried by the company was the same description of paper that was formerly carried through the complainants: That the company lowered their rates to Somerville, in order to give a preference to him and to themselves, and to prevent him from employing the complainants, and that it had had that effect, and the complainants were materially prejudiced and injured by being deprived of the carrying and cartage of the said paper, and the company got the benefit of it: That there was, it was believed, some special agreement between the company and Somerville; that there were no circumstances sufficient to justify the difference of charge made to him; and that the cost to the company of carrying the said paper for Somerville was precisely the same as the cost of carrying it for the complainants; and that it was carried by the same description of trains and in the same quantities that it would have been carried for the complainants, if sent through them.

Sir Fitzroy Kelly, Q. C., and *Field*, in Trinity Term, showed cause, upon the affidavits of James Grierson, the general superintendent of the company's goods traffic, and of Charles Wilkinson, a person employed by the company at Bristol to canvass for goods traffic and collect accounts.

The former stated in substance as follows,—That all goods are, for the convenience of making rates from and to the various stations of the company, divided into classes, but the goods in any one of the said classes are of various descriptions, and are quite distinct from each other, and the risk, expense, and trouble of carriage to the said company of any one article in each class is not in the same proportion as the risk, expense, *and trouble of the other articles contained in [*315 the same class: That the said classes, and the rates founded upon them, express the terms upon which the company are willing as a general rule to carry the goods mentioned in them; and other railway companies adopt similar classifications; but it is the practice of all companies and carriers to depart from such rates in those cases where, by reason of any particular circumstances, it is to the advantage or convenience of either sender or carrier to make special agreements: That writing-paper is in the third class, and the rate since August last for all goods in that class from Bristol to London had been 35s. a ton, including 1s. 6d. for cartage at Bristol, and 3s. 4d. for cartage in London, which sums respectively were allowed to parties carting their own goods to or from the stations at either end of the journey, and such rate included the usual carrier's risk, which was borne by the company: That the company were the proprietors of, and carriers of goods upon,

other railways besides their line from Bristol to Paddington, that is to say, as well to Birmingham, Manchester, Liverpool, and the north of England, as also to Salisbury, Weymouth, and other places in the south west, and it was of great importance to the company to acquire and increase such last-mentioned traffic: That the Midland and other lines of railway were competing carriers for such last-mentioned traffic, and the complainants were also competing carriers for the same, either on their own account or as agents for such other companies; and the complainants, as the deponent had been informed and believed, did not send any goods from or to Bristol by the Great Western Railway other than they could avoid [sic], but sent by such other competing lines all goods over which they had any control or influence: That Mr. Somerville was a very extensive manufacturer; and had been in the habit of *816] sending large quantities of paper to the north of England, and which paper had been carried by other lines than the Great Western Railway, and that Somerville was also in the habit of receiving large quantities of materials and other goods, and used formerly to send his goods by the said company direct, but that he was solicited and induced by the complainants or their agents to carry with them instead: That, it being of great importance to the company as well to obtain all Somerville's carrying and also that which he could influence to be carried over any of the company's lines of railway, the deponent directed the company's agent in Bristol, Mr. Wilkinson, to ascertain whether and upon what terms he would be willing to come under an engagement to that effect; and, after some negotiation and correspondence, the deponent wrote to Somerville, and offered him a rate of 27s. 6d. a ton on a contract to send all his goods; and to this the deponent received the following reply, dated 7th November, 1857,—“Sir,—27s. 6d. per ton will not meet my views. I have already sent a few lots past you, which I have no wish to do, as I prefer the railway to steamer at all times. I shall not make a final arrangement with all my goods till I hear from you. I prefer sending all by same conveyance, instead of a part by steamer, and a part by you.” That, Somerville having refused to give this rate, the deponent directed Wilkinson to endeavour to arrange a rate with him, and wrote to Somerville to that effect; and subsequently a rate of 23s. 4d. a ton was agreed upon for paper between Bristol and London, which was to include the cartage in London, but not at Bristol, and the paper carried at that rate was to be at the risk of Somerville, who was also to send all other goods he had to send at the ordinary rates by the company, and also to send all his goods, including paper, by the said *817] company, which were going to any place to which the said company directed: That the deponent considered it a great gain to the company to have secured the whole of Somerville's traffic, and a fair equivalent, with the absence of risk on their part, for the reduction in the rate on the one article of paper between Bristol and London, the risk in carrying paper of damaging it being considerable, and particularly paper supplied, as the paper in question was, to a government department: That there was no other person who sent paper from Bristol to London in any quantity except Somerville: That the complainants are agents for the Midland Railway Company and the London and North Western Railway Company, and would not agree to similar terms to those agreed to by Somerville: That, if they would so agree,

the company would enter into a similar agreement with them for the carriage of paper from Bristol to London: That the complainants were constantly endeavouring to obtain the customers of the company, and succeeded in so doing, making contracts or otherwise so as to secure the traffic to themselves: That it is the universal practice with railway companies to enter into special contracts under circumstances similar to that of Somerville, and especially when there is a large quantity of one kind of goods, and two modes of conveyance; and that the deponent believed it was necessary for the fair carrying on of business to allow of such arrangements.

Wilkinson's affidavit was in substance as follows,—That, prior to August last, the company charged for writing-paper from Bristol to London 22s. 1d. a ton where a larger quantity was sent at one time than 6 cwt., and 33s. 4d. a ton for smaller quantities than 6 cwt. sent at one time, and these rates respectively included a charge of 1s. 6d. a ton for cartage at Bristol, and 3s. 4d. a ton for cartage in London, which were respectively allowed to those persons who did the *cartage themselves: That, in August last, the rates were altered for [*318 writing-paper into one general rate irrespective of the quantities sent at one time, except when it was sent as a parcel, and this rate was 35s. a ton from Bristol to London, which also included the above-mentioned charges for cartage in Bristol and London; but the goods charged for at this rate were carried at the company's risk; and that the complainants were in the habit of sending paper at those rates from Bristol to London, but which chiefly belonged to Somerville: That, in consequence of instructions from Mr. Grierson, the company's general superintendent, the deponent put himself in communication with Somerville, and that, after much discussion about reducing the rates, it was agreed between the deponent and Somerville that Somerville should send all goods of every description over which he had the power to direct the mode of carriage, and which might be going to any place where the Great Western company carried, by the said company; and that, in consideration of his so agreeing, the deponent agreed on the part of the company that Somerville's writing-paper from Bristol to London should be carried for 23s. 4d. per ton, including cartage to London, but not including the cartage at Bristol; but at this rate *the paper was to go at Somerville's risk*: That Somerville also promised to use his influence with those who supplied him with goods carriage paid, to send them by the Great Western Railway Company's railway, but he stipulated, as to goods going to places where there were other railways, that the charges to be made by the company should not be more than other railway companies charged to those places: That, for some time prior to the date of this agreement, Somerville had received at Bristol large quantities of rags, and some other goods, which did not generally travel by the lines of railway of the said *company, but were [*319 carried on rival lines; and he had also sent from time to time large quantities of paper to places where the Great Western Railway Company carried, besides London, on other rival railways: That the Great Western Railway Company carried goods to the north of England as far as Manchester and Liverpool, and to intermediate stations, and also southward to Salisbury and Weymouth, to which places there was a keen competition with other railway companies, and also to a very

great many other places in England besides London; and it was a great advantage to the company to obtain a promise of the carriage of all Somerville's goods: That the deponent communicated the above arrangement to Grierson, and he wished him to have the terms agreed upon put into writing, and accordingly Somerville, on the 9th of December, 1857, addressed a letter to the deponent as follows,—“I am quite willing to send all my papers by your company to the various places at which you deliver, on condition that your rates are not higher than other railway companies. I shall instruct my people to send all goods by you so long as our arrangement of carrying to London continues:” That, after this date, the agreed rate of 23s. 4d. a ton was charged to Somerville, pursuant to the said arrangement, for paper going from Bristol to London: That, subsequently, in order that the meaning of Somerville in the arrangement might be made quite clear, the deponent was requested to have the agreement put in a more formal shape, and he, at the deponent's request, accordingly, on the 17th of February, 1858, wrote the following letter, for the purpose of explaining the agreement,—“In consideration of your charging me for the conveyance of paper at my exclusive risk from Bristol station to London at 23s. 4d. per ton, delivered within your usual limit, I agree to send by your line all my

*320] goods going to stations and *places to which you carry:” That the company had carried other goods than paper for Somerville, since the said arrangement, between other places than between Bristol and London, at their ordinary rates,—the reduced rates only applying to paper between Bristol and London, and which said other goods, or some of them, the company would not have carried but for the said arrangement: That the complainants carried on business at Bristol and elsewhere over England in rivalry to the Great Western Railway Company, and in connection with the Midland Railway Company and other railway companies, for some of which companies they were the agents, and they invariably sent goods that they received for carriage by other routes than the Great Western Railway if possible, and, in many instances, they diverted traffic which was intended for the Great Western Railway Company, and sent it on other railways: That the company, for their own convenience, in making out their charges, had made classifications of goods, so that all goods enumerated in each class were charged the same sum per ton, unless carried at the sender's risk or under a special agreement; and that writing-paper sent without any agreement would be charged in the third class, which from Bristol to London was 35s. a ton, inclusive of cartage at Bristol and London, the charge for which was deducted from the rates charged to the complainants, as they carted their own goods: That the goods enumerated in the company's third class, besides paper, were very numerous and distinct, and of various descriptions; that Somerville would be charged the company's ordinary rates for all other goods in that class, except writing-paper, sent to London, in respect of which the said agreement had been made, but the company would undertake in respect of all such goods, and for writing-paper when carried at the rate of 35s. a ton, the usual

*321] *carrier's risks and liabilities; and that the risk to the company on writing-paper was very considerable, and the more so on Somerville's paper, as he supplied the government chiefly, and his paper was rejected if there was the least defect in or damage done to it: And

that the said arrangement was not made to give a preference to Somerville, or to the company, but to secure all his traffic to the company, as aforesaid; and that the deponent thought it was worth the company's while to make that reduction in the terms aforesaid, having regard to their own interest.

Unless the special agreement disclosed by these affidavits be held to be justified, it will be impossible for railway companies to make any special contracts to facilitate the carriage of goods in large quantities, or even to issue season tickets. [COCKBURN, C. J.—Those are very different cases: the same advantage is held out to all who choose to avail themselves of it.] The language of the 2d section of the 17 & 18 Vict. c. 31, is clear,—“no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.” Is it giving an *undue* or *unreasonable* preference to Mr. Somerville, to carry his paper at the lower rate, in consideration of the advantages stipulated for by the company? If, indeed, it could be shown that the company declined to carry for others at the same rate, under the same circumstances, that might present a case of undue prejudice. But nothing of the sort is suggested here. The court has already, in Ransome's Case, 1 C. B. N. S. 437, decided, that, in dealing with this branch of the section, the *fair interests of the company are to be taken into the account. Cresswell, J., in giving the judg- [*322
ment of the court, there says: “The first thing to be ascertained, is the meaning of the expressions ‘undue or unreasonable preference or advantage,’ and ‘undue or unreasonable prejudice or disadvantage.’ Are those words to be construed with reference to the interests of the parties using the railway only? or, may the interests of the railway owners be taken in any manner into consideration? Ex. gr. if 1000 tons can be carried for a lower sum per ton than 100 tons, yielding an equal profit per ton to the railway company, may they so regulate the charge as to derive such equal profit? Would the lower rate charged for the larger quantity give an undue preference? Or, if goods can be carried one hundred miles at a lower rate than ten, and yield an equal profit per ton per mile, may the company charge less per mile for those carried one hundred miles, without giving an undue or unreasonable preference? If that *may* be done without giving what the statute calls an undue or unreasonable preference, may not the company, in fixing the rates, consider the whole profit, and not the mere profit per mile, and, in order to induce people to carry more on their line, and longer distances, agree to make a deduction in such case? It is true that the sender of smaller quantities for a shorter distance will pay more per mile and more per ton in the respective cases; but, will that be an undue or unreasonable prejudice or disadvantage? After a good deal of consideration, we think that the fair interests of the railway ought to be taken into the account.” If that be so as to the company's general tariff, does the circumstance of there being a special contract make any difference? Would it be an undue preference to convey a regiment of soldiers or large number of schoolboys from London to York at a lower

*323] *rate per head, in consideration of the numbers, than a single individual would be carried for?(a) The company profess their readiness to enter into the same contract with any one else that they have made with Somerville. [COCKBURN, C. J.—One man has goods to carry from A. to B., and thence to C.; another has goods to carry from A. to B.: would the company be justified in charging a higher rate to the latter because he does not also employ them to carry to C.?] The company would be bound to put the parties in exactly the same situation. [WILLIAMS, J.—Suppose there were two paper-makers at Bristol, each sending large quantities of paper by the railway, and one of them was also a timber-merchant,—could the company say to the latter, “If you will contract to supply us with sleepers at a given price, we will carry your paper for 10*s.* per ton less than any other paper?”] That would be stipulating for something which would not be for the advantage of the company *as carriers*. [COCKBURN, C. J.—You may agree for a lower rate, the owner taking upon himself all the risk of common carriers, provided you do it with all the world.] Then, may not the company enter into a contract for a lower rate, in respect of a larger quantity or a longer distance? [WILLIAMS, J.—Subject to its being reasonable. They must not swamp the retail dealers.] It is submitted that the statute gives the court no authority to interfere with the freedom of contracts between the company and their customers. [COCKBURN, C. J.—It is one of the incidents of capital, that the large dealer gets his goods at a lower price than the small dealer. So in the case of carriage. But the question is, whether, in adjusting their rates *324] of charge, the company are acting reasonably, or whether *they are not pressing too hardly upon the small dealer. If the latter is subjected to more prejudice than he ought reasonably to sustain, surely that is a matter that is within our province.] If the company are ready to carry at 20*s.* per ton for every person who will undertake to send 500 tons yearly, is there any law to prevent them from doing so? [COCKBURN, C. J.—The legislature has taken upon itself to fix the maximum rates,(b) and it has delegated to us the duty of seeing that the rates are imposed with due regard to the interests of the public, and equally. The object of the jurisdiction is, to prevent these great monopolies from degenerating into abuse.] The act itself, in s. 7, recognises special contracts. [COCKBURN, C. J.—That does not apply to special contracts for rates of carriage. These special contracts seem to me to be very objectionable. Why not have a graduated scale?] That would be most inconvenient. Is it illegal for a railway company to make special contracts? [COCKBURN, C. J.—I think it is very questionable. Here, for the purpose of competing with the complainants,—or, rather, depriving them of the trade,—you carry for Somerville for about one-third less than you do for the complainants.] The act applies to railway companies. This is a competition between two rival carriers. [COCKBURN, C. J.—The complainants are not carriers on your line: they are *carried*.] In the *Caterham Case*, 4 C. B. N. S. 419 (E. C.

(a) That would be an arrangement by which nobody could be prejudiced. But, suppose a school consisting of 1000 boys was carried at 10*s.* a head, while a school of 500 boys was charged 20*s.* a head?

(b) This has been questioned (as to the Eastern Counties Railway Company) so far as regards small parcels not exceeding 1 cwt. each. See *Baxendale v. The Eastern Counties Railway Company*, 4 C. B. N. S. 63 (E. C. L. R. vol. 93).

L. R. vol. 93), Cresswell, J., says: "By the act of parliament in question, very extensive powers are conferred upon this court,—powers which may be exercised for the benefit of the public, but which may also be exercised to the great detriment of those who *are engaged in carrying on railway concerns; and therefore the court [325 should be very cautious, before they set on foot an inquiry, to ascertain that there is reasonable ground for believing that the provisions of the act have been infringed."

Bovill, Q. C., and C. Pollock, showed cause.—Wherever there is a difference of charge between one person or class of persons and another, it is incumbent on the company to show circumstances to justify it: *Ransome's Case*, 1 C. B. N. S. 437 (E. C. L. R. vol. 87); *Oxalde's Case*, 1 C. B. N. S. 454. In the case of *Harris and The Cockermonth and Workington Railway Company*, 3 C. B. N. S. 693, a railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway: they also made a further reduction, under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway, direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of their traffic: and it was held that neither of these was a justifiable reason for the "undue preference" thus given. [COCKBURN, C. J.—It is enough for you to say that the company give themselves, as carriers, a preference over the complainants, for the purpose of securing to themselves the advantage of the 3s. 4d. for the delivery in London,—something not incidental to them in the character of a railway company.] In fact, they deprive the complainants of their only source of profit. [COCKBURN, C. J.—Is it competent to a railway company to make a special contract to carry for an individual, provided *they declare their willingness [326 to enter into the like contract with all the world?] The right of the railway company to make special contracts was substantially decided in *Ransome's Case*, 1 C. B. N. S. 437 (E. C. L. R. vol. 87). [BYLES, J.—Are they not bound to put up their tariff for all the world? (a) *Field*.—It would be impossible for the company to advertise all their special contracts. COCKBURN, C. J.—It would, no doubt, be difficult.] The validity of a special contract was virtually allowed in *Oxalde's Case*, 1 C. B. N. S. 454. [COCKBURN, C. J.—The question was not raised there; but I think it is one that is very deserving of consideration. Since the establishment of railways, there is no longer the wholesome competition which formerly existed between common carriers. The railways have acquired a monopoly of conveyance. The question is, whether the legislature has not intended to prevent these private arrangements, by requiring the exposure of the rates of charge. The question at all events, is one that is deserving of grave considera-

(a) The 23d section of the Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, enacts that "a list of all the tolls authorized by the special act to be taken, and which shall be exacted by the company, shall be published, by the same being painted upon one toll board or more in distinct black letters on a white ground, or white letters on a black ground, or by the same being printed in legible characters on paper affixed to such board, and by such board being exhibited in some conspicuous place on the stations or places where such tolls shall be made payable."

tion.] The 17 & 18 Vict. c. 31, was passed for the express purpose of remedying the insufficiency of the provisions of the 90th section of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20.(a)

Cur. adv. vult.

*327] *WILLES, J., delivered the judgment of the court:—

This was a rule obtained by the persons carrying on business under the firm of Pickford & Co., calling upon the Great Western Railway Company to show cause *why a writ of injunction should not
*328] issue against them pursuant to the Railway and Canal Traffic Act, 1854, enjoining them to desist from an alleged preference to one William Somerville over the complainants in respect of paper manufactured by him, and carried by the defendants from Bristol to London.

The material facts are as follows:—The complainants are common carriers from Bristol to London, using for that purpose the Great Western railway. They are also common carriers from Bristol to various other places, using for that purpose lines in rivalry with the Great Western Railway Company's lines other than that from Bristol to London. William Somerville is a paper manufacturer at Bitton, near Bristol, who is in the habit of sending large quantities of paper to London and also to the other places before mentioned. Prior to August last, Mr. Somerville employed the complainants to carry his paper to Lon-

(a) See the 51st section of the Great Western Railway Company's Amendment Act, 7 Vict. c. iii., which provides and enacts, "that in all cases where the said Great Western Railway Company are intrusted with the carriage or delivery of any goods, wares, merchandise, or parcels, or other matters or things, it shall be lawful for the said company to enter into such arrangements as they may think fit with all or any of the persons to whom such goods, wares, or merchandise, parcels, matters, or things may belong, or by whom the same may be brought or sent for conveyance on the said railway, with reference to the warehousing, assortment, weighing, loading or unloading, risk of stowage, and liability to alleged pilferage or damage, or with reference to the collection and delivery of such goods, or with reference to any other special facilities or accommodations afforded to or by the said parties in reference to such goods, wares, merchandise, parcels, matters, or things, and upon such terms and conditions as the company and such parties respectively may be willing to accept and abide by; and it shall also be lawful for the said company to enter into and make such arrangements as they may see fit with any company or person with regard to the collection or delivery of such goods, wares, merchandise, parcels, matters, and things, and upon such terms and conditions, as the company and the parties to such arrangements respectively may be willing to accept and abide by: Provided always, that, if it shall be considered by any such person making use of the said railway that the said company have to his prejudice accorded any special facilities to any other such persons which they are unwilling to accord him, then and in such case it shall be lawful for the party so conceiving himself to be aggrieved to appeal to the Court of Quarter Sessions of the county or one of the counties in which such facilities are accorded; and the said court shall have power, and are hereby required, on such application (of which fourteen days' notice shall be given to the company), to appoint a barrister of not less than seven years' standing, or some other competent person not interested in or connected with the railway or the party with whom any such dispute shall arise, to inquire into the matter in difference; and the person so to be appointed shall have power to call before him and to examine all persons whose evidence may be considered necessary to the inquiry, and to require the production of all books, papers, and writings which he may deem requisite or which ought to be produced for the elucidation of the matter referred to him; and, on the report of such person, it shall be lawful for the said court to order and require the said company to admit the party making such appeal to the enjoyment of the same facilities which may at the time be granted by the company to other such persons under the like circumstances, unless it shall be proved to the satisfaction of the person making such inquiry that any wilful fraud or contravention of agreement with the company has been committed by the party making such appeal; and the said company shall in all things conform to and abide by the order which may be so made by the said court upon due consideration of the circumstances under which, and the extent to which, such fraud or contravention may have been carried by such party."

don and deliver it there; and the complainants employed the respondents to carry it on their railway from the station at Bristol where it *was delivered by Somerville, to the station at Paddington, [*329 where it was received by Pickford & Co., they delivering it in London. At that time the respondents charged the complainants at the rate of 22s. 1d. per ton, being their charge for first class goods, including cartage to and from the railway, deducting, in fact, 1s. 6d. for the cartage to the station at Bristol, and 8s. 4d. for the cartage in London. The complainants made their profit upon the cartage in London. In the month of August, 1857, the respondents raised the charge for the carriage of the paper from 22s. 1d., the charge for goods of the first class in their printed scale of charges, to 35s. per ton, the charge for goods of the third class in that scale. The complainants in consequence made a proportionate increase in their rate of charge to Somerville. In the following month, Somerville complained of the increased charge, and stated, that, unless it was reduced, he would send his goods by sea. A correspondence followed between the complainants and respondents, in which the former endeavoured to persuade the latter to reduce the charge, pointing out that otherwise Somerville's goods would go by sea instead of by railway: but the latter refused to make any reduction. This part of the correspondence closed on the 14th of November, 1857. Shortly afterwards, the complainants learned that the respondents were carrying Somerville's goods at the rate of 23s. 4d. per ton, including cartage from Paddington, in order, as the complainants allege, to induce Somerville to send his paper through the respondents, instead of through complainants, as formerly. Thereupon, on the 2d of December, 1857, the complainants wrote to the respondents, remonstrating upon the course that had been taken as follows:—"We have been much surprised to find that your Bristol district manager, after refusing to make any reduction *in the rate charged to us [*330 for paper from Bristol to London, has gone behind our backs to our customer, Mr. Somerville, and made an arrangement with him to carry his paper at about 10s. per ton less than the company were in the habit of charging to us when Mr. Somerville employed us instead of you to cart it to London. We cannot suppose for a moment that the company will sanction such dishonourable as well as illegal conduct on the part of one of their managers: but, unless it is discontinued immediately, and we are allowed to carry Mr. Somerville's paper at the same reduced rate as you are now charging him, we shall place the matter in the hands of our solicitors, and instruct them to take legal measures to obtain compensation for the injury done to us, and to protect us from a repetition of it."

The reply of the respondents (on the 4th of December) was as follows:—"I am desired to acknowledge the receipt of your letter of the 2d, addressed to the directors, upon which they will give their instructions at the next meeting of the board. As you acquaint them of your intention to resort to legal measures, they think it may be proper to refer your letter to their own solicitors before they reply to it."

Upon the 16th of December, the following further reply was sent by the respondents to the complainants, stating in the most distinct manner the position assumed by the former in this litigation:—"The directors of this company desire me (the secretary) to acquaint you, in reply to

your letter of the 2d instant, that they must decline to lower any of their proper rates for the conveyance of goods, excepting in cases where a special agreement may enable the board to do so with mutual advantage, upon conditions to which both may assent. The board presumes *331] that it is not your intention to undertake to transmit by this railway all the traffic which you can obtain for the places to which this company are carriers, inasmuch as they know that you are engaged in taking away by other lines as much as you can obtain and influence. If they are mistaken in this view, you will be kind enough, perhaps, to submit any proposal which may enable the board to enter into any special agreement with your firm, in consideration of which terms it may be in their power to meet your request."

The complainants did not comply with the terms required in that letter: and, after an ineffectual attempt to alter the decision of the respondents stated therein, the complainants made this application to the court, stating, amongst others, the above facts, and that the paper now carried by the company for Somerville is the same as to quantity and quality, and mode and cost of carriage, and in all other respects, as when carried by the complainants; and that, in fact, there is no circumstance to justify the difference in charge now made.

The respondents, in answer to this case, set up, in effect, that they carry for Somerville upon the terms of a special agreement between them and him, containing stipulations so much to their advantage as to be worth the whole difference of charge. The terms of the agreement, as stated in the affidavit of James Grierson, the respondents' general superintendent of goods traffic, was as follows:—"A rate of 28s. 4d. a ton was agreed upon for paper between Bristol and London, which was to include the cartage in London but not at Bristol; and the paper carried at that rate was to be at the risk of the said William Somerville, who was also to send all other goods he had to send at the ordinary rates by the said company, and also to send all his goods, including paper, by the said company, which were going to any place to which the said company directed."

*332] "In the affidavit of a person in the employ of the company at Bristol, who negotiated the agreement, it was stated as follows:—"It was agreed between me and the said William Somerville that the said William Somerville should send all goods of every description over which he had the power to direct the mode of carriage, and which might be going to any place where the said Great Western Railway Company carried, by the said company: and, in consideration of his so doing, I agreed, on the part of the company, that his writing-paper from Bristol to London should be carried for 28s. 4d. per ton, including cartage to London, but not including the cartage at Bristol: but, at this rate, the said paper was to go at the risk of the said William Somerville. The said William Somerville also promised to use his influence with those who supplied him with goods carriage paid, to send them by the Great Western Railway Company's railway; but he stipulated, as to goods going to places where there were other railways, that the charges to be made by the said company should not be more than other railway companies charged to those places."

The terms of the agreement as existing on the 9th of December, 1857, were put into writing in the following letter written by Somerville

in the presence of the respondents' agent Wilkinson:—"I am quite willing to send all my papers by your company to the various places at which you deliver, on condition that your rates are not higher than other railway companies. I shall instruct my people to send all goods by you so long as our arrangement of carrying to London continues."

Subsequently, on the 17th of February, 1858, at the request of the company's agent, for the purpose, as alleged, of explaining the agreement, Somerville wrote the following letter:—"In consideration of your *charging me for the conveyance of paper, at my exclusive risk, from Bristol Station to London, 23s. 4d. per ton, delivered [*333 within your usual limit, I agree to send by your line all my goods going to stations and places to which you carry."

On the part of the respondents, it is further stated that it is a great gain to the company, and a fair equivalent for the difference of charge, to have the advantage which they derive by securing the whole of the traffic of Somerville, or in which he is interested, to the North of England and elsewhere, upon their lines other than that between Bristol and London, together with the advantage of the goods being carried from Bristol to London at his risk. It is not alleged in the affidavits, nor was it suggested in the argument, that the insurance upon Somerville's goods from Bristol to London alone was worth the difference of charge,—nearly one-third of the entire price of carriage: and it is clear, from the correspondence, that the respondents would never set that up as the cause of the difference of charge, nor have given the complainants the benefit of the difference, even if the latter had taken upon themselves the risk. Indeed, the complainants never had an opportunity of doing this, because they never were informed that it was part of the agreement with Somerville; and they were not required by the letter of the 16th of December to take it upon themselves.

The question, therefore, is reduced to this,—whether it is a legitimate ground for giving a preference to one of the customers of the railway, that he engages to employ other lines of the company for traffic distinct from and unconnected with the goods in question or their carriage. And we are of opinion that it is not. The goods are the same in quantity and quality, in the cost of receiving and carriage, and in the profit which is *thereby made, whether they be received [*334 from Somerville or from the complainants; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ them in totally distinct transactions. In this respect, the present case is altogether distinguishable from that of Nicholson against the same respondents,(a) in which a difference of charge was sustained, upon goods from and to the same places, between persons who sent large quantities at a time, and stipulated to send given large quantities every year, and others who declined to do so. The advantages therestipulated for by the company related to the carriage of the goods upon the same line, and directly affected the rate at which they could profitably be carried. In fact, those advantages made a difference similar to that between the selling of goods wholesale and retail,—the profit of carrying the goods sent in large quantities at the less rate at which they were carried equalling or exceeding the profit upon the goods sent in

smaller quantities at the greater rate at which they were carried. In the present case, as already explained, the advantages stipulated for are wholly distinct from and do not affect the price or profit of the carriage from Bristol to London; and they ought not to be taken into account in determining the charge for such carriage.

Upon this ground, therefore,—as to which the facts cannot be disputed,—and without entering into the other points urged on the part of the complainants, we think they are entitled to the relief they ask.

A question was suggested upon the argument, as to whether the rule ought not to have been framed upon the ground of undue prejudice, rather than undue preference. In order to avoid any dispute hereafter upon *335] this purely formal matter we mould the rule, as we *announced we should if necessary do, so as to include both points, as follows, viz. enjoining the company to carry paper and other goods in their third class of goods for the complainants from Bristol to London, at the same rates that they charge to William Somerville, and also enjoining them to desist from charging William Somerville less for the carriage of paper from Bristol to London than they charge to other persons, and less than they charge for the carriage of other goods of the third class; and also enjoining them to desist from charging the complainants more than they charge William Somerville for the carriage of paper manufactured by him from Bristol to London;—and to abstain from subjecting the complainants or their traffic from Bristol to London to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The rule will be absolute in these terms, and with costs.

Rule absolute accordingly.

On a subsequent day in this term, *Field* applied to the court to reform the rule. He submitted that its terms were too large; for, that the court could not have intended to order the company to carry all goods in the third class upon the same terms as they carried Somerville's paper, seeing that, by their arrangement with Somerville, all goods carried for him other than paper, were carried upon the same terms as they were carried for other persons.

Bovill, Q. C., contra, submitted that there was no reason for varying the rule; and that, having put Somerville's paper into the third class *336] for their own purposes, if any *embarrassment resulted to the company from so doing they must be left to bear the consequences.

COCKBURN, C. J.—The terms of the rule were dictated by my brother Willes after much consideration. The company seem to have put themselves in a false position by placing paper in their third class. They may take it out again. (a) Amendment refused.

(a) It was stated that the classes were arranged by the railway "clearing-house," but that the rates of charge were settled by the companies respectively.

In the Matter of the Complaint of JOSEPH BAXENDALE and Others, carrying on Business under the Firm of Pickford & Co., against THE GREAT WESTERN RAILWAY COMPANY.
Nov. 15.

[*Reading Case.*]

It is competent to this court, under the Railway Traffic Act, 17 & 18 Vict. c. 31, s. 2, to interfere to prevent a railway company from fixing the rate of tolls to be taken on the railway with a view to the promotion of their own interests, where their so doing subjects others to unreasonable disadvantage, or operates to their prejudice by giving undue preference to third parties.

Down to a recent period the Great Western Railway Company charged a uniform rate of 3s. 6d. per ton on all goods in a particular class conveyed on their railway between their station at Reading and Paddington. These goods were collected and delivered (principally) by the complainants at a charge of 4s. 10d. per ton. The company raised their charge for carrying goods under 500 lbs. weight to 8s. 4d. per ton,—being the aggregate of the former charge for carrying and that for collecting and delivering; with an intimation to the public that they would collect and deliver goods *free of all charges*. The real purpose of this arrangement was made apparent to the court to be, to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business, and the profit upon it, to themselves, as well as to exclude the complainants from competing with them in this department of business:—

Held, that the complainants were entitled to an injunction,—the above arrangement being objectionable, both as an undue preference given on the one hand, and as an unreasonable disadvantage imposed on the other; for, that it was an undue preference of the company in their separate capacity of carriers *other than on the line of railway*, inasmuch as they thereby secured to themselves the entire monopoly of the last-mentioned traffic, to the entire exclusion of the complainants and all others; and it was an undue prejudice and an unreasonable disadvantage imposed on the complainants, inasmuch as their goods and those of all persons employing them, as indeed the goods of all persons other than those who employed the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery if they were required to collect and deliver for them, or to an unnecessary charge if they required no such accommodation.

The Court declined to review the above decision, under the 5th section of the 17 & 18 Vict. c. 31, upon a suggestion that it had been erroneously assumed on the argument that the collection and delivery of parcels was a source of profit,—the fact being otherwise.

C. POLLOCK, in Trinity Term last, obtained a rule on behalf of Messrs. Baxendale, calling upon the Great Western Railway Company to show cause why a writ of injunction should not issue against the company pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the *carrying, or in the collecting, carrying, and delivering for themselves or other persons of goods and parcels under 500 lbs. weight, or in their charges for the same, over the complainants, in the carrying of such goods and parcels for the complainant; and enjoining the company not to subject the complainants to any undue or unreasonable preference [prejudice] or disadvantage in the charges made to them for carrying such goods or parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such parcels as aforesaid; and enjoining the said company from giving any undue or unreasonable preference or advantage to the traffic of goods and parcels weighing more than 500 lbs. weight, over the traffic of goods and parcels weighing less than 500 lbs. weight, with reference to the charges for the collection, carriage, and delivery of such goods and parcels respectively; and enjoining the said company to desist from subjecting the traffic of goods and parcels weighing less than 500 lbs.

weight to any undue or unreasonable prejudice or disadvantage over [sic] the traffic of goods and parcels above that weight, with respect to their charges for collecting, carrying, and delivering, or carrying only, *338] such goods and parcels respectively; and *why the said company should not be enjoined from subjecting the complainants to any undue or unreasonable prejudice or disadvantage, and from giving any undue or unreasonable preference with respect to the carrying, or the collecting, carrying, and delivering of such goods and parcels,—with costs.

The motion was founded upon the affidavit of Thomas William Outrim, a clerk in the service of the complainants, who deposed in substance as follows:—That the complainants are common carriers carrying on business under the name of Pickford & Co., and are in the habit of collecting packages of goods from their customers who require them to be sent between London and Bristol and intermediate places, one of which is Reading: That, for the purposes of their said business, the complainants are in the habit of carting such packages to and from the stations of the Great Western Railway Company, consigning such packages as they cart to the stations of the said railway company in the name of the complainants' firm of Pickford & Co., to their firm at the station to which the goods are to be carried, where they are received by the complainants' clerks or agents, and are by them carted to the residences of the persons for whom they are intended in the neighbourhood of such station: That the company are the proprietors of the railway from Paddington to Bristol, passing the intermediate stations, one of which is Reading: That the company, in addition to their traffic and business as a railway company, also carry on the business of common carriers, by collecting goods from their customers and carting them to the stations upon their railway from which they have to be sent, then carrying them upon their line to the station nearest to the town or place for which they are intended, and from such last-mentioned station carting them to *339] the residence of the person for whom they are *intended: That the company charge the public a rate for the carriage of goods upon their said railway from station to station which rate includes collection and delivery, that is to say, cartage from the residence of the consignor to the railway station from which they are sent, and cartage from the station to which they are sent to the residence of the consignee for whom they are intended: That the company, until the time hereinafter mentioned, in all cases in which the collection and delivery was done by themselves, used to charge the complainants for the carriage of biscuits between Reading and London at the rate of 8s. 4d. per ton; and, when the collection and delivery was done, not by the company, but by the complainants, the company used to charge instead of 8s. 4d., the sum of 8s. 6d. only, and, in the carriage of consignments weighing less than a ton, made a proportionate difference in their charge in the same manner: That, on the 19th of April last, the complainants received a letter from the company, as follows,—“I beg to give you notice, that, on and after Monday next, the rule of not allowing rebate for collection or delivery on consignments under 500 lbs., will be strictly carried out in all cases:” That, on the 19th of April last, the complainants, by their servants, delivered to the company at their station at Reading, fifty-seven packages of biscuits, each package weighing under 500 lbs. weight, and the whole weighing together 2 tons, 2 quarters, and 4 lbs., which

said packages of biscuits were delivered by the complainants' servants to the company at their said station, at the same time, and were consigned in the complainants' name of Pickford & Co., Reading, to the complainants as Pickford & Co., Paddington, where they were received by the complainants on the following day, and were carted by their servants to the persons for whom they were intended; and that the company, *instead of charging to the complainants for the carriage of the said biscuits at the rate of 3s. 6d. per ton, charged [*340 at the rate of 8s. 4d., to which charge the complainants objected, but the company insisted thereon, and the complainants paid it under protest: That the complainants on the said 19th of April last, and on every day since except Sundays, have delivered to the company at Reading, consigned to the complainants at the station at Paddington, numerous packages of biscuits and other goods in one consignment, each consignment containing packages of the same articles, such as consignments of separate packages of biscuits and consignments of separate packages of tea, each package of such consignments being under the weight of 500 lbs., but in the aggregate considerably exceeding 500 lbs. weight, and each consignment being carted by the complainants to the station at Reading, and carted by the complainants from the station at Paddington to the residences of the persons for whom they were intended, and the company have charged the complainants the said rate of 8s. 4d. per ton on each of the said consignments; and that the complainants have on each occasion objected to the said charge, and claimed to be charged at the rate of 3s. 6d. per ton only, but the company have on each occasion persisted in charging the complainants at the rate of 8s. 4d. per ton, and the complainants have paid the company at such rate, under protest: That the said overcharge has also since the 19th of April last been made by the company against the complainants, in cases where consignments of packages weighing less than 500 lbs. weight each, but in the aggregate weighing above 500 lbs. weight, have been sent by the complainants for carriage in the manner above described by the company between London and other stations on their line, and also between intermediate stations, although the collection and *delivery as [*341 before described has in all such cases been done by the complainants, and such overcharges, amounting to a large sum of money, have been objected to by the complainants, and paid by them to the company under protest: That, in consequence of the said overcharges, the complainants, by their attorneys, on the 21st of April last, wrote to the company as follows,—“We are instructed by Messrs. Pickford & Co. to protest against a new practice which your company have now commenced, of limiting the allowance hitherto made to them (Pickford & Co.) for collection and delivery of goods which they deliver and receive at the company's stations, to goods exceeding 500 lbs. in weight: and we are further instructed to give you notice, that, unless the allowance is made upon goods under that weight, as heretofore, legal proceedings will be taken against the company forthwith. We may add that it was decided by the Court of Exchequer in 1842, in a case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399,† that railway companies are bound to allow for the collection and delivery, where those services are not performed by them, in order to put all the customers of the railway company on an equal footing: and no distinction between goods

of any particular weight has ever before been attempted to be made, and obviously cannot be supported." That the company answered the said letter through their attorneys, as follows:—"The company consider they are justified in the charges to which you refer, though you do not accurately describe them. The case against the Grand Junction Railway Company, even if it should be sustained by the highest court, which we doubt, really does not determine the question between your clients and ours. The facts are not at all identical,—besides the question of smalls:" That there are no circumstances which make the cost to the *342] company of collecting, carrying, and delivering parcels over 500 lbs. weight less than the cost of collecting, carrying, and delivering parcels under 500 lbs. weight, to the extent of the difference of charges made by the company as before described; nor are there any circumstances which make the cost to the said company of the carrying only for the complainants of packages under 500 lbs. weight as much as the cost of collecting, carrying, and delivering them; nor are there any circumstances which can justify the company in making such distinction as is complained of by the complainants.

Sir Fitzroy Kelly, Q. C., and *Field*, showed cause, upon an affidavit of James Grierson, the general manager of the goods department of the Great Western Railway Company, who stated, that he was well acquainted with their system of and charges for carrying and collecting, and collecting, carrying and delivering goods: That the company do not show any favour or make any distinction between the complainants and the public, or between any other carriers or persons and the public; and that ever since he had been in the employment of the company, their system of charge had been and still was exactly the same to all persons using their line under the same circumstances: That the charge of the company for carriage of goods of the second class from Reading to London, was, and had been since the 17th of April last, 8s. 4d. per ton; and that biscuits and tea are in the second class for Reading, and for other places tea is charged in the third class, and at a higher rate: That Reading is distant thirty-six miles from London, station to station, 1s. 5½d. being the sum charged by the company for 500 lbs. weight, at 8s. 4d. per ton, for carriage between station and station; and that it was a reasonable and fair sum for such carriage, and was and had been since the *348] 17th of April last charged alike to all persons, and like reasonable rates were made for small quantities under 500 lbs. between other stations and places, and the same were charged alike to all persons respectively: That there had been for a long time, and then was, very great competition in the carriage of goods between London and Reading, in consequence of no less than three routes by railway existing between those places, viz., one by the South Western Railway Company's lines, one by the South Eastern Company's lines, and the other by the Great Western Company's line; and that this competition existed much more in the city of London and town of Reading, than at the Great Western Railway Company's stations at Paddington and Reading respectively: That, in the month of April last, an alteration was made in the charges of the company generally, and as to all parcels of goods of the same kind in the second class which weighed more than 1 cwt., but less than 500 lbs., the station to station rate between Reading and Paddington was at the rate of 8s. 4d. per ton, while the same amount was charged for

such goods from the city of London to the town of Reading, collected and delivered by the company; and rates and charges were made for the other stations on the company's lines in the same manner: That these rates were open alike to the complainants and to all other persons whomsoever: That the company have agents in various parts of London, and agents in Reading and other towns, for collecting and delivering goods, and who are and always have been ready to call for, collect, receive, and deliver respectively the goods of the complainants, whether above or under 500 lbs., or whether packed parcels or not, exactly in the same way and on the same terms as they do those of every other person employing them: That the company have been in the habit of allowing persons who send goods to lump *together as one consignment [*344 all packages of goods of the same kind, even in cases where they are not obliged to do so by their act of parliament, and have only charged on the aggregate weight, whether above or under 500 lbs., as for one package of such weight; and that they have done this and still do this to the complainants and to all others, although, from the nature of the complainants' business, they gain very much by this practice, inasmuch as they collect as carriers small parcels or packages from different persons, and are very often able to make an aggregate weight of the same kind of goods: That every one of the packages referred to in the seventh and eighth paragraphs of Outrim's affidavit were separately addressed to persons other than the complainants, and none of them contained any mark showing that they were for one consignee, and to be delivered to the complainants: and each of such packages was separately entered with the separate name and address thereon, which separate name was inserted by the complainants in the consignment-bill delivered by the complainants to the company, and according to the system of business invariably adopted by the company, and, of necessity, by any good system of business, each of such packages was required to be weighed separately, and entered separately in the accounts, way-bills, and books, and other documents of the company relating to the same; and the receiving, carrying, and delivering of packages so delivered and addressed, is attended with much more trouble and expense to the company than if the same had been addressed to one consignee: That the company can afford to carry, and collect, carry, and deliver, parcels over 500 lbs. weight at less rates in proportion than parcels under that weight; and the small-parcel traffic is attended with greater expense and trouble in proportion than the traffic exceeding 500 lbs.: That the company *carry all goods received from the complainants, referred to in Outrim's affidavit, as carriers, and undertake the [*345 duties and responsibilities of carriers, and this is and would be so whether the goods are received at the station and carried to the station, or collected, carted, and delivered by the company: And that the present rate for goods mentioned in the second class of the same kind and sent in one consignment from the station of Reading to the station at Paddington, is, and has been since the 17th of April, 3s. 6d. a ton where the weight is over 500 lbs., and that, as in all other cases, equally to the complainants and all other persons.

The affidavits disclose nothing in respect of which the court can be called upon to enforce the provisions of Mr. Cardwell's act against this company. [COCKBURN, C. J.—Do they not disclose conduct on the part

of the company the necessary effect of which must be to drive Messrs. Baxendale's traffic off the Great Western line?] If 8s. 4d. per ton is a reasonable charge for the carriage of the goods in question from Reading to London, whatever the consequence may be, the company are justified in enforcing it. They have no desire to interfere with Messrs. Baxendale's trade: what they have done is merely to enable them to compete with the South Western Railway Company; and they make no difference between Messrs. Baxendale and the rest of the public. A preference to the company themselves is not a preference within the act. The court has no jurisdiction over them as carriers upon their railway. The simple question is, whether 8s. 4d. per ton is a reasonable charge for the carriage of the goods in question from Reading to London. Assuming that it is a reasonable charge, then comes this question,—have the company a right to say, we will charge to all the world this sum of 8s. 4d. per ton, but for that charge we will not only *346] carry the goods upon the railway, but we will *also collect the goods at Reading and deliver them to the consignees in London? In many places the passengers are conveyed from the railway to their ultimate destination by omnibus, without any additional charge. By the 7 Vict. c. iii., the company are empowered, when acting as carriers, to make such charges (not exceeding the sums limited by their former acts) as they shall think expedient: and by s. 51(a) they are empowered to make arrangements for the assortment and delivery of goods and parcels. And by the 10 & 11 Vict. c. ccxxvi., s. 54, it is enacted, that, “for the carriage of small parcels (that is to say, parcels not exceeding 500 lbs. weight each) the company may demand *any sum which they think fit*; provided always that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages.” [COCKBURN, C. J.—These provisions apply only to carriage on the railway. Here, the company profess to charge 8s. 4d. per ton in respect of the carriage from station to station; whereas, the charge in fact comprehends something which is done beyond the railway. CROWDER, J.—The special agreement spoken of in the 51st section of the 7 Vict. c. iii. is for something dehors the carriage.] The company had an undoubted right, whether for a good or a bad reason, or from mere caprice, to raise the rate of carriage from 3s. 6d. per ton to 8s. 4d. Our affidavit shows that the company had no desire to prejudice the complainants, but that their sole motive was to compete with the South Western Railway Company in the carriage between Reading and London. [COCKBURN, C. J.—It might, perhaps, be a legitimate proceeding, if the object *347] of the company was merely to bring increased traffic *on their line. But here the object manifestly is, to make a profit of the collection and delivery: the charge of 8s. 4d. is ostensibly for carriage on the railway, but in reality it is to cover the collection and delivery likewise.} In *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77 (E. C. L. R. vol. 88), the company agreed with agents to collect and deliver goods for them, charging the public a small charge for doing so, in addition to the charge for conveyance on the railway; to those agents the company allowed in addition a sum out of the receipts of the

company. The plaintiff, who collected and delivered his own parcels, but was charged as highly as the rest of the public, complained that in effect this arrangement caused his goods to be charged higher than those sent through the agents, and that the difference was an overcharge. By their act, the company were to charge all persons equally for conveyance, but there was a proviso that they might make agreements as to the collection and delivery of merchandise; and there was an appeal given by the act to the sessions by any one prejudiced, against any arrangement giving special facilities to others. It was held, that, under these enactments, the agreement with the agents, against which there had been no appeal, did not render the charges to the plaintiff overcharges. That case is precisely in point. The judgment of the court upon the eighth question there explains the true ground upon which the present case is to be distinguished from *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399,† which will probably be relied on by the other side.

Bovill, Q. C., and C. Pollock, in support of the rule.—Upon principle as well as upon authority and the true construction of the 17 & 18 Vict. c. 31, s. 2, the charge now appealed against is wholly unjustifiable. *The common law imposed upon carriers the duty of carrying [*348 for reasonable charges; and reasonableness to a certain extent involves equality of charge. [COCKBURN, C. J.—We are not dealing with the common law duties of carriers, but with the case of a company authorized by act of parliament to impose certain rates for the carriage of goods upon their railway.] The company may, it is true, within certain limits, charge what they please; but the charge must be equally imposed upon all: *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399;† and that case was approved of by the Court of Queen's Bench in *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77 (E. C. L. R. vol. 88). *Pickford v. The Grand Junction Railway Company* is precisely this case. The company there were carriers on the London and Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester Packs" were charged 3s. 3d. per cwt., or 65s. per ton. At the foot of this list was a notice that "goods were brought to the station at Camden Town without extra charge, and that there was no charge for booking or delivery in London." The company made an agreement with C. & H., that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10s. per ton out of the entire charge of 65s. per ton: and it was held, that, under these circumstances, the charge of 65s. per ton, when made to any other persons who were ready to receive their goods at the station at Camden Town, was both *unreasonable* and *unequal*. The 51st section of the 7 Vict. c. iii. has no application at all to this case. The object of the recent statute was, to check the growing monopoly of these great companies of all the carrying trade of the country. [COCKBURN, C. J.—The real question here is, whether the company *are not under colour of a charge for car- [*349 riage upon the railway, making the complainants pay for a service which they do not require at their hands. What right have the company to compel all the world to employ them to collect and deliver?] The charge clearly is not a charge for carrying only: and it is merely

adopted as a means of imposing undue prejudice upon the complainants.

COCKBURN, C. J. (stopping *C. Pollock*).—The court entertain a strong impression, and will probably pronounce judgment to-morrow.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court:—

We are of opinion, without further calling upon the counsel for the complainants, that this rule must be made absolute.

The short facts are these:—Down to a recent period, the defendants, the Great Western Railway Company, charged a uniform rate of 3s. 6d. per ton on all goods conveyed on their railway between their stations at Reading and Paddington. The goods were collected and delivered both by the company and by the complainants, Messrs. Baxendale & Co., at a charge of 4s. 10d. per ton. The railway company have now raised the charge for carrying goods under 5 cwt. to 8s. 4d. (being the aggregate of the former charge of carrying and that of collecting and delivering), with an intimation to the public that the company will collect and deliver goods free of all charges.

It is alleged on the part of the complainants, and scarcely denied on the part of the defendants, that the real purpose of this arrangement is, to compel persons desiring to have their goods conveyed by the railway *350] way to employ the railway company to collect and deliver such goods, and thus to secure this business and the profit upon it to the defendants, as well as to exclude the complainants from competing with the defendants in this department of business.

We entertain no doubt that this representation is true, and that such is the purpose and will be the effect of this scheme of the company, if it is suffered to be carried out. Some attempt, indeed, was made to show that a desire to avoid the competition of other railways had prompted the alteration in the rate of charge: but the attempt totally failed, and is unworthy of further consideration.

The main stand made by the counsel for the company was, on the ground, first, that, although the legislature has imposed upon railway companies the obligation of affording accommodation on equal terms to the public, it cannot have been their intention to deprive them of the right possessed by all trading companies as well as by individuals, of using their property, and managing their affairs, within the scope of the purpose for which they were constituted, in such manner as they think most to their advantage; and, secondly, that, in the present instance, the company had by act of parliament the power of raising their rates at their own will and pleasure, provided they raised them equally as against all persons; that here they had raised them equally against all; and that it was not within the authority of this court to fix limits to the amount of accommodation which the company might think proper to afford gratuitously beyond the conveyance by the railway, for which the toll was charged.

We think there is little difficulty in disposing of these arguments. It is abundantly clear, from the statutory enactments which enjoin on *351] railway companies the obligation to afford accommodation on equal and reasonable terms, and from the provisions of the statute by which jurisdiction is given to this court against the affording of undue preference or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies

the unfettered exercise of their rights as proprietors of their respective lines: but, in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public.

The policy and justice of such a requirement are manifest, it being obvious that the powers of a railway company, and its monopoly, under the impossibility of all competition, might otherwise be converted into a means of very grievous oppression, by a difference in point of charge or in point of accommodation made in favour of one man at the expense of another, or by disadvantages in respect either of charge or accommodation imposed on one as compared with another. And it is plain that the oppressive effects of such inequality will be equally great, whether its motive and operation be to benefit third parties or the railway company itself.

Such being plainly the intention of the legislature, and this court having been constituted the tribunal by which any injustice or inequality in the working of the railway system as between the companies and the public is to be redressed, we must endeavour to prevent any injustice either in the rate of charge or the degree of accommodation afforded, at the same time that we carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary [*352 rights which (subject to the before-named *qualification) a railway company, in common with every other company or individual, possesses, of regulating and managing its own affairs, either with regard to charges or accommodation, or to the agreements and bargains it may make in its particular business.

Greater difficulty, no doubt, arises in dealing with cases in which the purpose and effect of the matter to be considered, although it may incidentally have the effect of prejudicing third parties, is in reality to the benefit of the company itself, than in those in which the immediate object is to give an undue advantage for the benefit of a third party; yet we think that no serious difficulty will be found in ascertaining the principles on which the authority of this court should be exercised.

It may be convenient in the first place to advert to a distinction not always kept sight of in argument, between cases in which the interest of the company sought to be promoted by the regulation or act complained of, is one which arises with reference to the railway itself, as to which the question occurs, and those in which the benefit sought to be obtained by the company is one which has reference to interests distinct from those of the particular railway; as, where, for example, the company are the proprietors of another railway, or carry on some other business. In the latter class of cases, it appears to us clear that the company must be taken to be, quoad the particular railway, in the position of third parties, and that they cannot, with a view to such separate interest, give an undue preference or impose an unreasonable disadvantage, any more than they could do so to promote the interest of any other party. Thus, if a railway company, being proprietors of one line from A. to B., and of another line from C. to D., were, in order to obtain the custom of a particular individual on the first of *these [*353 lines, on which they might be subject to competition from a rival

line, to agree to convey his goods on the line, from C. to D., at a cheaper rate than those of another person using only the latter line; or, if a railway company carry on, in addition to its business as carriers on the line, that of carriers to and from the termini of the railway, were, with a view to obtain additional custom in the latter, to carry on the railway, for those who employed them as carriers to and from the railway, at a lower rate than for those who did not: in both these cases, we should have no difficulty in holding that the company must be considered, as regards these separate interests, in the light of third parties, and that they cannot promote their interests at the expense of the right of the public to that equality on the particular railway which it was the intention of the act of parliament to secure.

Greater difficulty and nicety perhaps arises in dealing with cases in which the purpose and effect of the thing complained of is, the benefit of the company in their character of proprietors of the particular railway. In these cases, the court might feel greater reluctance to interfere, partly from an unwillingness to interfere with parties in the management of their own affairs for their own advantage, partly from a disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the court became clearly satisfied that a company was seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances and operated unfairly and injuriously upon particular individuals, or that it was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this court would not hesitate to interfere to prevent such *354] a result, although by so doing they *might prevent the company from securing all the profit that it might otherwise derive from the use of its property.

Thus, where the complaint was that a railway company, as between the two intermediate stations, charged a higher rate than was due to the intermediate space in proportion to the charge made on the entire line of railway, this court, if it were made to appear that the disproportion was not justified by the circumstances of the traffic,—in other words, was an undue prejudice or unreasonable disadvantage to those using the part of the railway in question,—would interfere to set aside such arrangement.(a) So, again, if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favourable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantage were extended to all persons under the like circumstances; yet it would assuredly insist on the latter condition, and would interfere in the case of any special agreement by which the company had secured to a particular individual the benefit of such an agreement, to the exclusion of others, or even where an attempt had been made, by keeping the agreement secret, to make it operate unduly to the prejudice of third parties.

This reasoning appears to us effectually to dispose of the argument that the court cannot interfere to prevent a railway company from fixing

(a) See *In re Jones and The Eastern Counties Railway Company*, 3 C. B. N. S. 718 (R. C. L. R. vol. 91).

the rates of tolls to be taken on its railway in such manner as shall best promote its own interests, in cases where by so doing the company subjects others to unreasonable disadvantage, *or operates to [*355 their prejudice, by giving undue preference to third parties.

We proceed to consider the second ground taken by the defendants, which is, in substance, that, having power to raise their rates of charge for carrying on their line, and having done so equally as regards all, they do not come within the statutory prohibition against undue preference or undue prejudice, by affording other accommodation in addition to that of carrying on their line.

We think this argument rests upon two obvious fallacies,—first, that of supposing that the whole charge in question is one made by the company in reference to their character and interests with respect to the railway, whereas, in reality the charge is made by them in a character and interest independent of the railway, viz. as carriers to and from the termini of the railway;—secondly, that the company can convert that which is in reality a charge for collecting and delivering, as well as for carrying, into one for carrying only, by affixing to it the latter denomination in their table of rates.

It is true, no doubt, that the company's acts give them power to impose their own rates of charge for the carriage of this description of traffic: but these acts give them no power to impose tolls or charges for collecting and delivery; and it is palpably an abuse of their powers, if, under the name of a charge for carrying on their line, they impose, otherwise than with the assent of the parties concerned, a charge for a totally different thing. Again, although the legislature has conferred the power of imposing rates of charge, it has annexed to this power the obligation of imposing such rates equally; and the company cannot be permitted to evade this obligation by colourably pretending that that which is in fact a charge for other things as well as for carriage is a charge for carriage only.

*The court is bound to look at the transaction in its true [*356 light, and cannot suffer itself to be diverted from its duty of interfering to prevent what in effect is such an injustice as it was the purpose of the legislature to prevent, because the transaction is attempted to be covered over by a transparent disguise.

Looking, then, at the alteration in the rates in its true light, we are of opinion that the arrangement is objectionable both as an undue preference given on the one hand, and as an unreasonable disadvantage imposed on the other. It is an undue preference to the company in their separate capacity of carriers other than on the line of railway, inasmuch as they thereby practically secure to themselves the entire monopoly of the last-mentioned traffic, to the entire exclusion of the complainants and all others. It is an undue prejudice and unreasonable disadvantage imposed on the complainants, inasmuch as it is plain that their goods, and those of all persons employing them, as, indeed, the goods of all persons other than those who employ the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery if they employ others to collect and deliver for them, or to an unnecessary charge if they require no such accommodation.

On these grounds, we are of opinion that the case is one within the

mischief and provision of the act; that it is our duty to interfere; and that, consequently, this rule must be made absolute, and with costs.

Rule absolute, with costs.(a)

Jan. 18, 1859. *The Attorney-General* (with whom was *Field*), in the *course of the following term, moved to rescind or vary the rule
 *357] of the 15th of November, under the 5th section of the 17 & 18 Vict. c. 31, which enacts, that, "upon the application of any party aggrieved by the order made upon any such motion or summons as aforesaid [s. 2], it shall be lawful for the court or judge by whom such order was made, to direct, if they think fit so to do, such motion or application on summons to be reheard before such court or judge, and upon such rehearing to rescind or vary such order.

The affidavit upon which the motion was founded stated, that the change of system made by the company in April last was adopted by the company for the purpose of restoring and securing to them their fair and legitimate profits as owners of and carriers upon their lines of railway, of which they had to a great extent been deprived by the practices of the complainants and other carriers: That the company's rates of charge on the railway were much higher in proportion for parcels under 1 cwt. than for parcels above that weight, and the complainants
 *358] and other carriers adopt every means *in their power to get the parcels and packages they deliver to the company above 1 cwt., by packing such parcels together and sending them as one parcel in a bag or hamper, and thereby they obtain the carriage of such parcels on the company's lines at a sum far under the sum charged by them to the aggregate of the senders and consignees, and far under the sum which the company would be entitled to and would receive for the carriage of the same parcels if they had been sent separately; the carriers thus taking to their own use and depriving the company of the profit thereby made, and which the company otherwise would receive: That the complainants and other carriers gain so much by this system of packing that they can afford to underbid the company in their rates, and to carry parcels for less than the company's charge would be for the same parcels if received by them direct: That the complainants and other carriers are in the habit of aggregating parcels without packing them into one bag or hamper; that is to say, they put their own address over that of the ultimate consignee, and thus bring up small parcels into a weight enabling them to be carried at a less proportional charge, and which they charge the sender or consignee for at the higher rate of charge: That, in all these cases, the complainants and other carriers collect the parcels as separate parcels, either by the sender taking them

(a) The rule was originally drawn up in the terms in which it was moved; but, upon application to the court, and reference to a judge at Chambers, it was ultimately settled as follows:— "That a writ of injunction do issue against the company, pursuant to the Railway and Canal Traffic Act, 1854, enjoining the company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and delivering, for themselves or other persons of goods and parcels under 500 lbs. weight, or in their charges for the same, over the complainants, in the carrying of such goods and parcels for the complainants; and enjoining the said company not to subject the complainants to any undue or unreasonable prejudice or disadvantage in the charges made to them for carrying such goods or parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such parcels as aforesaid."

to their receiving-offices, or from door to door by sending round carts for the purpose, and they deliver the parcels packed or aggregated at, and receive them from, the stations of the railway, claiming the deductions formerly allowed for collection and delivery: That a sum was formerly allowed to carriers and the public alike, in all cases where goods were delivered to and received from any of the stations of the railway, and whether they were small parcels or not,—the sum of 3s. 4d. a ton or at that rate being allowed in *London, and 1s. 6d. a [*359 ton at country stations, which sums were not fixed upon with a view to a profit being made upon collection and delivery respectively, but the company were willing to collect and deliver for those sums as representing about the actual cost of the services performed, they looking then, as they do now, to making their profit on the railway, and merely performing those services as subsidiary thereto; and that complainants and other carriers made no profit out of the allowances so given to them, but made their profit out of booking-fees and by means of their being able to use the railway by packing and aggregating goods, and the other practices above mentioned: That the company were advised that the practices of the carriers as above mentioned were authorized by law, and that the company were bound to receive the parcels from the carriers so packed or aggregated, as if they were persons in trade, and as if the parcels were really sent by them in that way to other persons in trade; and that, in consequence of the continued practices of the complainants and other carriers to pack and aggregate in the manner above mentioned, and their rivalry against the company, the company considered that they could afford to forego the whole or a portion of their charge for collection and delivery of smalls, by offering inducements to the public to send such parcels to them direct, instead of their passing through the hands of carriers, and that the company would in that way obtain more by being able to charge for the carriage on their railway for parcels received from the public separately than they did formerly, when they made a charge for collecting and delivering: That the company therefore, in April last, determined to make no charge for the collecting and delivery of parcels under 500 lbs. weight, or, in other words, to make the charge from station to station, on the railway the same as the *charge from or to the company's [*360 receiving-houses or the sender's door, to and from the consignee's door; but that, inasmuch as the system of packing or aggregating was not adopted (as being of no advantage to the carriers) when applied to parcels or packages other than smalls, the company had not altered their system in respect to these parcels or packages: That the company had for some time established receiving-houses in several parts of London, and in all large towns and places where their lines of railway touched, at convenient spots for collection of goods, and thereby and by offering inducements to deal with them direct, they obtained (but in a fair way of business) the direct delivery of smalls to them at such receiving-houses, instead of having them "packed" or aggregated at the stations by the carriers as aforesaid; and that the difference of profit earned by the company upon their lines of railway in respect of small parcels delivered at their receiving-houses, or collected by them from door to door, was enough to render it well worth their while to collect and deliver such parcels to and from the stations without any charge at

all for such collection and delivery: That the rates mentioned in the affidavits of the complainants as charged by the company, did not, nor did any of the company's rates from station to station, include the collection and delivery of good as alleged, but they were rates for carriage on the railway only, and it was by the profit on the railway that the company were enabled to defray the cost of collection and delivery as to smalls: That the complainants and other carriers were, under the circumstances aforesaid, rival and competing carriers on the railway, and the company were acting in the premises bonâ fide with a view to their legitimate and fair profits as carriers on their railway: That the company charged the same rate to everybody as well as to the complainants and other carriers; and they had at all times been ready and willing to collect and deliver for them on the same terms and in the same way as they did for the public generally; and that the system adopted, and now complained of, was, under the circumstances, a fair system, and one which treated carriers in respect of collection and delivery as if they were not carriers,—as they had always claimed to be treated when packing and aggregating goods: That the complainants and other carriers might still make a large profit by such packing and aggregating, and also by getting a booking-fee on each parcel, while they would only be obliged to pay the company one booking-fee for a packed parcel, even if sent to the company's receiving-offices: That the complainants are agents for the London and North Western Railway Company, and other railway companies, for the management of their goods business in London and elsewhere, and as such agents they have for a long time adopted the same system, with the public and with carriers, as to making allowance for the collection and delivery of parcels, that they complain of against the Great Western Railway Company: And that it is the general practice of all principal railway companies which collect and deliver goods, to refuse to make an allowance for collection and delivery on parcels below a certain weight, or, in other words, they collect, carry, and deliver such goods for the same charge as they make for the carriage from station to station, and bear the cost themselves of the collection and delivery.

The clause upon which this application is founded was evidently introduced in consequence of the magnitude of the interests which are involved in the inquiry, and the absence of an appeal. [COCKBURN, C. J.—We made the order after full consideration, and gave our reasons very elaborately: and I do not see why we should be called upon to review it,—unless, indeed, it can be shown that we misapprehended the facts, or there be some new matter.] The court is asked to review the principle of the decision: and the importance of this is obvious, seeing that, if the court err, the error is irremediable. The attention of the court is invited to the same facts, but in a more enlarged view. [COCKBURN, C. J.—What probability is there of our arriving at a different result from that which we came to after much consideration?] It is found to be utterly impracticable to obey the rule. The order is, “that a writ of injunction do issue against the company pursuant to the Railway and Canal Traffic Act, 1854, enjoining the company to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and delivering, for themselves or other persons, of goods and parcels under 500 lbs.

weight, or in their charge for the same, over the complainants, in the carrying of such goods and parcels for the complainants; and enjoining the company not to subject the complainants to any undue or unreasonable preference or disadvantage in the charges made to them for carrying such goods or parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such parcels as aforesaid." The charge for a package not exceeding 500 lbs. weight from Paddington to Reading, or vice versa, is 8s. 4d. per ton. Messrs. Baxendale bring to Paddington a package weighing 500 lbs., to be conveyed to Reading. The company charge for that 4s. 2d. It is said that this is forbidden by the rule: and they are called upon to reduce the charge by 3s. 4d. per ton in respect of collection in London, and 1s. 6d. in respect of delivery at Reading. But the court has not specified the sum. [COCKBURN, C. J.—In order to secure the traffic to themselves, the *company increased their charge by exactly that sum. The true effect of the rule which we pronounced is this,— [*363 the company may charge what they like for conveyance on the railway, but they must not charge for collecting and delivering off the railway, which is ultra the character of a railway company. All was easy enough before the company mixed up the two charges, for their own purposes. Why is it so difficult to disentangle them? Why put on the charge of 3s. 4d. and 1s. 6d., the price Pickford & Co. charge for the collection and delivery, when you say that the company can afford to collect and deliver without any charge?] We show that this is done by all the companies, and by Pickford & Co. themselves, as agents for the Great Northern Railway Company. It is impossible to give effect to this rule consistently with the act of parliament. If the court had intimated, or will now intimate, what the company are to deduct from or to add to the charge for carriage on the railway, the whole may be understood. [COCKBURN, C. J.—The company have no right to call upon us to specify any sum. All we say is, do not include in your charge for carriage on the railway a charge for something else.] If the court will give us a principle upon which we can ascertain the sum, that is all we ask. [COCKBURN, C. J.—Why add precisely 3s. 4d. for collecting?] Because our acts of parliament allow us to charge what we please. [COCKBURN, C. J.—Then make the charge equal. The fact of your adding the 3s. 4d. was too transparent to deceive any one.] The 3s. 4d. was found to be the average expense to Messrs. Baxendale for collecting and conveying parcels and packages to Paddington. If Messrs. Baxendale are entitled to make this claim upon the company, has not every one else the same right? Or, might not an individual claim even a larger deduction, by reason of the average cost of collection and delivery to him being greater *than it is to Messrs. Baxendale? Neither [*364 party, it appears, derives any profit from the collection and delivery: the profit to Baxendales, as well as to the company, arises from the carriage on the railway, by reason of the number of small parcels which are packed or aggregated. [COCKBURN, C. J.—This was never suggested on the former argument.] It was found as a fact in Parker v. The Great Western Railway Company, 6 Ellis & B. 77 (E. C. L. R. vol. 88), that 3s. 4d. per ton was not an adequate sum to pay the expense of collection. [COCKBURN, C. J.—We all assumed in this case that the company imposed this charge for the purpose of taking away

the complainants' profits.] The affidavit upon which this motion is made expressly and pointedly denies that the collection and delivery are any source of profit. This court has no jurisdiction in respect of the charges for collection and delivery. The principle of the decision to which the court has come upon this rule subverts the entire course of railway business. It in effect prohibits the company from doing what every man has a right to do, viz. to collect and deliver gratuitously.

COCKBURN, C. J.—We are of opinion that the application for a modification or a rehearing of the rule pronounced in this case should not be granted, no sufficient ground having been made out for the interference of the court in the present stage of the proceedings. It is not suggested that the court misapprehended the facts stated in the affidavits or admitted on the argument: but it is suggested that one of the facts which we assumed on that occasion, viz. that this business of collecting and delivering small parcels, that is, parcels not exceeding 500 lbs. weight each, which was carried on both by the complainants and the company, was a source of profit, was an erroneous assumption.

*365] We cannot, however, help observing that *it was allowed on all hands to be assumed as a fact; and, if erroneous, the company had ample means of making the fact known. We think it would be *pessimæ exempli* upon such a ground to re-open the rule. But it is unnecessary to determine that, because it is plain that the judgment proceeded upon the two-fold ground that the company, in making the charge for carriage on the railway cover the expense of collecting and delivering, were doing that which they were not justified in doing, viz. giving an undue and unreasonable preference to themselves as carriers, and imposing an undue and unreasonable prejudice and disadvantage upon the complainants. The question now suggested leaves the second of these grounds wholly unaffected. The court was of opinion, and is still of opinion, that, by subjecting the goods of the complainants to the charge for collection and delivery, they imposed upon them an undue and unreasonable disadvantage as regards the goods of other persons. We are prepared to abide by the principle upon which we decided on that occasion: and we should add, that my Brother Willes, who was not present at the former argument, entirely coincides with the principles enunciated by the court upon that occasion.

Rule refused.(a)

(a) No light whatever is thrown upon the 5th section of the Railway and Canal Traffic Act, 1854, by the discussions in either House during the progress of the bill: but it may well be doubted whether it was intended to give this anomalous sort of appeal, and whether it was not rather meant to afford a remedy to some third person (not party to the original motion) who might be aggrieved by the order.

***In the Matter of the Complaint of THOMAS NICHOLSON
the Younger and ISAAH BIRT NICHOLSON *against* [*366
THE GREAT WESTERN RAILWAY COMPANY. Nov. 9.**

It is competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that, in entering into such agreements, the company have only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them be adequate, and the company are willing to afford the same facilities to all others upon the same terms.

Nor is the 2d section of the Railway Traffic Act, 17 & 18 Vict. c. 31, contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee.

THE complainants, coal-owners in the Forest of Dean, in Trinity Term, 1857, obtained a rule calling upon the Great Western Railway Company to show cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the company to desist from giving any undue preference or advantage to or in favour of the traffic in coals from Ruabon, and also to desist from subjecting the traffic in coals from Bullo and Lydney, in the county of Gloucester, over their lines of railway, to undue or unreasonable prejudice or disadvantage; and also to desist from giving to the Ruabon Coal Company (Limited) any undue preference or advantage for or in respect of the carriage of coal by the said Great Western Railway Company, and also to desist from subjecting the complainants, for or in respect of the carriage of coals for them by the said Great Western Railway Company from Bullo and Lydney, to any undue or unreasonable prejudice or disadvantage; and also enjoining the said railway company to carry coals for the complainants on equal terms with the said Ruabon Coal Company (Limited), having regard to the circumstances, if any, which render the cost to the said railway company less, in carrying for the said Ruabon Coal Company (Limited), than it costs the said railway company in carrying for the com- [*367 plainants,—with costs.

The motion was founded upon the joint affidavit of Isaiah Birt Nicholson, one of the complainants, and Aaron Goold and John Trotter, who were respectively lessees under the crown and proprietors of coal-mines and collieries in the Forest of Dean, and who deposed in substance as follows:—

1. That Nicholson and his copartners were in the habit of purchasing large quantities of coal raised in the Forest of Dean, amounting to many thousand tons a year, and transmitting the same from Bullo and Lydney, by means of the Great Western Railway, to their customers or agents for sale at or near the various stations of the Great Western Railway and its branches: 2. That Goold and his partner were lessees under the crown and proprietors of extensive coal-mines and collieries in the Forest of Dean, and were engaged as partners in working the same; and, in the course of such business raised annually many thousands of tons of coal, the greater portion of which they transmitted to Bullo, and there delivered the same to the Great Western Railway Company for the purpose of being carried by them by means of their

railway, either for the traders who purchased the same from them, or to their customers or agents for sale thereof, at or near the various stations of the Great Western Railway and its branches: 3. That Trotter and his partners also were lessees under the crown and proprietors of extensive coal-mines and collieries in the Forest of Dean, and engaged as partners in working the same; and, in the course of such business, raised many thousands of tons of coal annually, a portion of which they transmitted to Lydney, and there delivered it to the Great Western Railway Company either for the purpose of being carried by them by *368] their railway for the traders *in coal who purchased the same from them, or on their own account to their own customers or agents for sale thereof at or near the various stations of the Great Western Railway and its branches: 4. That the Great Western Railway commences at London and proceeds thence to Didcot, thence to Swindon and Bristol, and one branch thereof proceeds from Swindon to Gloucester; that it is there joined by the Gloucester and Forest of Dean Railway, of which the Great Western Railway Company have become and are the lessees, working the same, and which railway proceeds to Grange Court, in the county of Gloucester, at which point it communicates with the South Wales Railway, which runs thence to Bullo and Lydney, both which places are near to the Forest of Dean, at each of which places there is a considerable goods station on that line, the former of these places being about five miles and the latter twelve miles from Grange Court: 5. That the Great Western Railway is entitled to one-fourth of the capital and one-third of the revenue of the South Wales Railway Company, and to nominate one-third of the directors thereof, with the privilege of supplying all rolling stock; and, by an arrangement with the South Wales Railway Company, the whole of the coals at Bullo and Lydney intended to pass on, to, or over any portions of the Great Western Railway are there received by the said Great Western Railway Company, and that that Company charge certain freight; and that the said Great Western Railway Company charged the deponents, the consignors, in their accounts with them, and they paid them, the entire freight for the coals carried for them respectively over any portion of the Great Western Railway from Bullo and Lydney aforesaid: 6. That the line of the Great Western Railway at Didcot is joined by a branch from Oxford, which is continued thence to Birmingham; and thence *369] the said Great *Western Railway is continued to Ruabon, in the county of Denbigh, by means of a line of railway of which the Great Western Railway Company have become and are either proprietors or lessees, and that the company conduct and work the whole traffic on their said line to and from Ruabon aforesaid to London and the various other stations on their said lines of railways and the branches thereof next mentioned: 7. That the Great Western Railway Company have also various branch lines from their said main lines,—viz. from Drayton to Uxbridge, from Slough to Windsor, from Maidenhead to High Wycombe, from Reading to Hungerford, from Reading to Basingstoke, from Chippenham to Warminster, and thence to Weymouth; and, upon the said various main lines and branch lines the company have numerous stations: 8. That the Great Western Railway is the only railway by which the coal raised in the Forest of Dean can be forwarded to London and the southern, eastern, and western parts of England, and the various

stations of the Great Western Railway and its branches: 10. That Bullo and Lydney are the nearest points on the line of railway to the coal-mines in the forest; and that, since the opening of the South Wales Railway to those stations, the deponents had been accustomed to deliver or purchase, to be delivered at Bullo and Lydney, large quantities of coal, amounting to about 100,000 tons a year, for the purpose of being put upon the said railway there, and conveyed by the Great Western Railway Company to various stations on their lines of railways on or for sale as aforesaid: 11. That, for the purpose of establishing the said trade, and promoting the sale of the coal at and near such stations, and conducting the said traffic, the deponents had expended very considerable sums of money; and, until the course hereinafter complained of was adopted by the company, they *carried on a prosperous [*370 business: 12. That, finding the Great Western Railway Company did not afford them all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from the said line of railway to the various stations on their said railways and the branches thereof, some of the coal-owners had incurred very considerable expense in providing trucks to assist in the conveyance of the coals from Bullo and Lydney to the stations of the Great Western Railway: 13. That, about one year since, a joint stock company was established for the working of certain mines of coal at Ruabon, in Denbighshire; and the formation of the said company was mainly promoted by the directors and officials connected with the Great Western Railway Company: 14. That, on the 21st July, 1856, the company was duly registered, pursuant to the statute 18 & 19 Vict. c. 133, and that the following is a copy of the memorandum of association, and of the names of the persons registered as forming the said company:—

“[LIMITED COMPANY.]

“MEMORANDUM OF ASSOCIATION

“or

“THE RUABON COAL COMPANY (LIMITED).

“1st. The name of the company is the Ruabon Coal Company (Limited).

“2d. The registered office of the company is to be established in England.

“3d. The objects for which the company is established, are, the winning, working, raising, getting, manufacturing, and selling, either manufactured or not, and either at the pit's mouth or elsewhere, of coal, cannel, slack, culm, iron-stone, fire-clay, free-stone, and other minerals and mineral substances whatsoever, lying *or to be found in, [*371 under, or upon certain mines or collieries, commonly called or known by the name of the Ruabon Collieries, situate in or near to the parish of Ruabon, in the county of Denbigh, in North Wales, and elsewhere, as the company may from time to time determine.

“4th. The liability of the shareholders is limited.

“5th. The nominal capital of the company is 50,000*l.*, divided into 1000 shares of 50*l.* each.

“We, the several persons whose names and addresses are subscribed,

are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names :—

Names and addresses of subscribers.	No. of shares taken by each subscriber.
1. Daniel Gooch, of Falthorpe House, Paddington, in the county of Middlesex, Esquire	400
2. Thomas Bulkeley, of Clewer Lodge, Windsor, in the county of Berks, Esquire	60
3. Herbert Clifford Saunders, of Westbourne Lodge, in the county of Middlesex, Esquire	100
4. David Thompson, of 7, Charles Street, Westbourne Terrace, in the county of Middlesex, Gentleman	2
5. William Sampson Tanner, of 5, Monmouth Road, Westbourne Grove, in the county of Middlesex, Gentleman	1
6. John Drew Higgins, of 46, Westbourne Park Road, Paddington, in the county of Middlesex, Gentleman	1
7. Thomas Merriman Ward, of 15, Randolph Road, Paddington, in the county of Middlesex, Gentleman	10
Total shares taken	574

15. That the whole of the said persons are either officers of, or persons immediately connected with, the *Great Western Railway Company; the said Daniel Gooch being locomotive superintendent thereof, and having great power and influence over the supply of engine-power and various officers and servants on the railway. 16. That the said Thomas Bulkeley is a director of the said company; the said Herbert Clifford Saunders is the son of the secretary of the company; that the said Thomas Merriman Ward is an officer of the said company in the registration office; and the said Messieurs Thompson, Tanner, and Higgins are or were clerks at the Paddington station of the said company: 17. That the whole paid-up capital of the said coal company, as registered, amounts to 28,700*l.*, and that the deponents had been informed and believed that the whole thereof had been subscribed by persons in the service of, or connected with, the Great Western Railway Company: 18. That the Ruabon Coal Company had been actively engaged in raising and getting the said coal ever since the time of its establishment, and sending the said coal along and over the Great Western Railway Company's lines to the various stations thereon: 19. That, ever since it commenced operations in July, 1856, most undue preference and partiality had been exhibited by the Great Western Railway Company to and in favour of the Ruabon Coal Company, to the prejudice of the deponents and other persons: 20. That the Great Western Railway Company, contrary to and in violation of their own acts, and the statute 17 & 18 Vict. c. 31, made and gave an undue or unreasonable preference or advantage to and in favour of the traffic in the said Ruabon coal, and subjected the traffic in the said Forest of Dean coal to undue or unreasonable prejudice or disadvantage in the respects hereinafter mentioned: 21. That the Great Western Railway Company also, in violation of the said acts, made and gave an undue or unreason-

able *preference or advantage to or in favour of the said Ruabon Coal Company in the same description of goods as those in [*373 which the deponents traded and trafficked, and subjected them and their goods or traffic to an undue or unreasonable prejudice or disadvantage: 23. That the effect of such undue preference and advantage had been greatly to injure the deponents' trade and the trade and demand for coals at Bullo and Lydney; and that, unless some measures were taken to put an end to such preference, the whole of their traffic would be limited and confined to Gloucester and other places in the neighbourhood, and the effect would be to exclude them from other markets at a distance, and to inflict the most serious loss on the whole of the coal traders and coal-mine owners in the Forest of Dean. 24. That the deponents had learned that a special agreement had been entered into between the Great Western Railway Company and the Ruabon Coal Company (Limited), respecting the carriage of coal for the last-mentioned company upon the said railways and the branches thereof. 25. That the same had been kept strictly private, and, though the deponents had formally applied for a copy thereof to the secretary of the railway, who promised to lay their request before the board of directors, they had never given them any copy thereof; and the same had been kept strictly private, and had not been communicated to traders, and a copy of it had been sent to a shareholder only upon the terms that it was not to be used for litigation in any courts of law or equity by other parties, or by himself as advocating other interests against those of the Great Western Railway Company. 26. That hence the deponents had been unable to ascertain the precise nature of the agreement, but they believed that the practice and course of dealing thereafter mentioned as pursued between the Great Western Railway *Company and the Ruabon Coal Company was [*374 in a great measure in accordance with and based upon it, and that it secured to them some of the following preferences and advantages, and the residue thereof was out of favour and partiality accorded to them by the Great Western Railway Company to the deponents' prejudice; and they had, in common with the other traders in the Forest of Dean coal, and the proprietors of collieries there, lately made complaints upon the subject of the various matters following to the Great Western Railway Company, and had been unable to obtain any satisfactory answer thereto or redress for the same, and that they did not deny that the agreement contains some stipulations of the nature thereafter mentioned. 27. That the stationery and other materials of the Great Western Railway were supplied by that company to the Ruabon Coal Company in the conduct of their business, and that no such privilege or liberty was allowed to the deponents. 28. That, with the permission of the Great Western Railway Company, the Ruabon Coal Company placarded their stations with advertisements of the said coal and the prices thereof; and the ticket offices of the railway company were furnished with circulars of the said coal company for distribution, and that no such privileges were allowed or permitted to the deponents. 29. That, with the permission of the Great Western Railway Company, the porters of the company were employed by the said coal company in unloading the trucks with their coal, and weighing the coal of the coal company into their customers' carts, and that no such privilege was allowed to the complainants: 30. That, with the permission

of the Great Western Railway, the station-masters and clerks of the railway company were employed by the Ruabon Coal Company to effect sales of, and in seeking orders for, the coal of the said company, and that *375] *no such privilege was allowed to the complainants: 31. That, under the said agreement, it was provided that the Great Western Railroad Company should pay 50*l.* a year towards the salary of each collecting clerk employed by the Ruabon Coal Company, and that no such privilege was allowed to the complainants: 32. That the deponents had been informed and believed that Mr. Hill and Mr. Stodart, as agents of the Ruabon Coal Company, and Mr. Gooch and Captain Bulkeley, when engaged or employed on the business of the Ruabon Coal Company, and coal merchants and traders, had been and were permitted to pass over the Great Western Railway to and from Ruabon, and to and from the various stations, on the business of the said coal company, and for the purpose of inspecting the coal and treating respecting the same, and other purposes connected with the business thereof, free of charge by the railway company,—a privilege not granted to the complainants and their agents or representatives, or to their customers: 33. That, under the said agreement, forty-eight hours was allowed for unloading the trucks of the Great Western Railway Company after their arrival, free of charge, when loaded with coal from Ruabon; but that practically a far longer time was allowed without any demurrage being charged; whereas, the complainants and their customers were only allowed twenty-four hours for unloading their goods from the trucks; and, if they failed to unload within that time, they were charged demurrage for the same: 34. That the rates per ton charged for the carriage of coal to the Ruabon Coal Company by the Great Western Railway Company were much lower than those charged to the complainants, either for a single truck-load, or for any larger quantity, carried the same distance: 35. That, for power and road, the Great Western Railway Company charged the *376] Ruabon Company 12½ per cent. *less than they charged the complainants: 36. That, for terminals, the Great Western Railway Company charged the Ruabon Coal Company 88 per cent. less than they charged the complainants: 37. That, for trucks, the Great Western Railway Company charged the Ruabon Coal Company in most instances 50 per cent. less than they charged the complainants, while, in some instances, the charge was 60 per cent. less than the charge made to the complainants: 38. That the Great Western Railway Company charged the Ruabon Company a far less charge than they charged the complainants for conveyance of coal, the like distances; that, for fifty miles the Ruabon coal was charged 25 per cent. less freight than the complainants were charged; that, for ninety-nine miles the Ruabon coal was charged the same freight as the complainants were charged for fifty miles only; that, for one hundred and fifty miles, the Ruabon coal was charged the same freight as the complainants were charged for ninety-nine miles only; and that, for two hundred miles, the Ruabon coal was charged 8 per cent. less freight than the complainants were charged for one hundred and fifty miles: 39. That these were instances and illustrations of the general scale of unequal rates charged against the complainants in comparison with the rates charged against the Ruabon Coal Company, and of the undue preference, partiality, and favour shown to the Ruabon Coal Company against the complainants and other traders at Bulle

and Lydney aforesaid: 40. That the freight for conveyance of the Ruabon coal to London professed to be 8s. 6d. per ton; but by the said agreement the deponents were informed and believed it was provided that this rate was only to be enforced when they did not sell their coal at a less price than 21s. 6d. for the best, and 20s. 6d. for the second or inferior coal, delivered to houses in London; and that, in the event of *the said coals being sold at lower prices, that a reduction should be made by the railway company in the freight which should be [377 equal to one-half of the reduction in price for which the same should be sold, such reduction not to exceed 1s. 3d. per ton; and that no such reduction or allowance was made in favour of the complainants from the Forest of Dean, but they were charged full freight for the whole sent by them whatever price they might realize: 41. That the deponents were informed there was a provision for a corresponding increase of charge in the event of the average price exceeding 23s. 6d. for the best, and 22s. 6d. for the second coal; but that the general price of such coal had not exceeded on the average the first-mentioned price, nor was it likely to do so; and that, at the present time, the price of the said second coal delivered in London does not exceed 18s. per ton; and that the Great Western Railway Company were carrying the Ruabon coal one hundred and ninety-eight miles for the sum of 7s. 3d. per ton, while the complainants would be charged 8s. 6d. per ton for the conveyance of like coal the distance of one hundred and thirty-three miles and a half only, to the same place, and that no reduction whatever in respect of bad prices was allowed to them: 43. That, further, the deponents were informed and believed that it was provided by the said agreement that, when the gross yearly revenue paid by the Ruabon Coal Company amounted to 60,000l., the Great Western Railway Company would allow 3d. per ton on the whole quantity sent, and when it amounted to 80,000l., 6d. per ton on the whole quantity sent; but no such deduction was allowed to the complainants: 43. That, further, the deponents were informed and believed it is provided by the said agreement that, in the event of the debts for the sales of the said coal in London turning out bad, the railway company *were to allow the Ruabon Coal Com- [378 pany one-half of the freight of the coals in respect of which the said bad debts should have been incurred; and that no such reduction was allowed to the complainants from the Forest of Dean: 44. That the railway company professed that they were ready to enter into an agreement containing similar stipulations with that entered into with the Ruabon Coal Company; but the deponents were informed and believed that they should thereby be required to bind themselves to send sufficient coal over the said railway beyond one hundred miles, producing a gross yearly revenue of 40,000l. to the railway company, and, after one year, in certain events, a gross yearly revenue of 60,000l., and, after two years, in certain events, a gross yearly revenue of 80,000l.; and that it was impossible for them to enter into any such stipulations: 45. That it was impossible for any traders or coal-owners in the Forest of Dean to enter into such engagements; that the defendants believed them to be a pretext and attempt in order to evade the act of parliament enforcing equal rates; that the operation of the bonus mentioned in the 42d paragraph was calculated to protect the Ruabon Coal Company from the competition of other companies and persons, rather than

to promote the development of the coal trade, and the increase of the revenue of the Great Western Railway Company; and that the effect of the said agreement would be, if supported, to give a monopoly to the Ruabon Coal Company; and such was the intention thereof: 46. That the railway company had no right to impose any such terms upon the complainants, and that they were entitled to have their coals carried and conveyed by the Great Western Railway Company upon equal terms with the Ruabon Coal Company: 47. That the privileges, advantages, benefits, and preferences, stated in paragraphs numbered 27, 28, 29, 30, *379] and 32, of the affidavit, were not provided for or tendered under the terms of the said agreement, but were privileges, advantages, benefits, and preferences, granted out of favour, partiality, and preference for the Ruabon Coal Company, quite irrespective thereof: 48. That the main inducement held out by the Gloucester and Forest of Dean Railway Company to prevail upon the legislature to grant their act, was, the great advantage which would ensue to the Crown, to whom the coal in the said forest belongs, and to the public, from the facilities which their railway would afford for the conveyance of the Forest of Dean coal, which would be effectually frustrated if the said preference and partiality continued: 49. That the deponents were informed and believed there was some provision in the agreement, that the Ruabon coal was to be carried in full train-loads; but they had ascertained that, in practice, this was not and never had been carried out, and, as the principal traffic therein was at different stations on the line, and not in London, it would be found to be impossible practically to carry it out: 50. And that, in consequence of the railway company having given such undue and unreasonable preferences and advantages to or in favour of the Ruabon Coal Company, and in consequence of the railway company having subjected the complainants and their said traffic to such undue and unreasonable prejudices and disadvantages as aforesaid, they had been and were much injured in their said trade and business; and, in consequence thereof, the trade and traffic in Forest of Dean coal on the Great Western Railway had been diminished, and great injury had been sustained by owners and lessees of collieries in, and traders in coal from, the said forest, who had urged the complainants to make this application, not only for the protection of their own, but their interests.

*380] *Bovill*, Q. C., and *Dowdeswell*, on a subsequent day, appeared to show cause upon the affidavits of C. A. Saunders, secretary to the Great Western Railway Company, W. L. Newcombe, their goods manager, and James Grierson, general traffic manager.

The affidavit of Saunders was as follows:—

1. The Great Western Railway Company became the proprietors of the Shrewsbury and Birmingham and Shrewsbury and Chester Railways in the year 1854, under and by virtue of the 17 & 18 Vict. c. ccxxii., and thereby for the first time obtained a direct through communication by their railways from Chester to London. 2. Before and at the time of their becoming such proprietors, the traffic in coal from the collieries in Denbighshire and Flintshire, near which the line passes, to places south of Birmingham, did not exist. 3. When the Great Western Railway Company became proprietors of the before-mentioned northern railways, and succeeded to the working of them in connection with their own proper railways south of Wolverhampton, the attention of the directors was called to

this question of coal traffic, and it was suggested that arrangements might be made for greatly increasing the supply of coal from the district before mentioned to London and other places south of Birmingham to which their railways afforded access, and thereby of bringing upon and carrying over a long extent of their lines a large and remunerative traffic. 4. With this object, after finding it unavailing to rely upon the individual efforts of the then proprietors of the collieries, the Great Western Railway Company, considering it their interest that a joint stock company should be established for purchasing and working some valuable mines at or near Ruabon, in Denbighshire, in close proximity with their Shrewsbury and Chester line, entered into communication with parties for encouraging *that object. 5. The company was [*381 in the course of formation and a provisional purchase of one-half of the collieries had been made, when at the ordinary half-yearly meeting of the proprietors of the Great Western Railway Company, held in February, 1856, the attention of the whole body of proprietors was expressly directed to this subject by the following passages in the report then presented:—"But, adverting to the still more important subject which has been treated in much detail by the special committee in their report, viz., the conveyance of coals for domestic purposes over considerable distances of your lines, and in constant as well as extensive supplies to the Metropolis and elsewhere, the directors are desirous of ascertaining the views of the proprietors upon that topic. Since that report was framed, one colliery near Ruabon, in North Wales, has already changed hands, with the avowed intention of working it by means of a joint stock company under the proposed new law, with limited liability, possessing an extended capital, for the purpose of raising and transmitting the best coals which can there be obtained for London and other southern markets over your lines. The advantages of that undertaking to the railway company, distinct in itself, as well as being a probable forerunner and example to be imitated by others in similar operations for procuring extended supplies of coal, are unquestionable; but the directors deem it right and proper to state that some of the parties engaged in the inception of this joint stock investment, are more or less officially connected with the service of the company, who propose to embark capital in it upon the same principle as was explained to and approved by the proprietors in February, 1853, and subsequently carried into effect in the instance of the Great Western Hotel Company. The directors think it, however, worthy of consideration, whether any person *having a duty connected with the [*382 management and disposal of coals, proposing to take part in the new joint stock company, should not at the discretion of the board be required to make his election within a reasonable period, either to relinquish his appointment in the Great Western service, or to forego any participation in the concerns of the joint stock company. With such special qualification, if the proprietors approve of it, your board can see no reason for withholding their sanction to the measure. If there seemed to be any probable conflict of interest in a matter so important both to the railway company and the lessees of the colliery, the board would have hesitated to entertain any question of arrangement with a joint stock company so constituted; but they believe, on the contrary, that transacting such business openly and avowedly upon fixed

and definite conditions with individuals directly interested in the welfare of this company, subject to the above-mentioned qualifications, and neither exclusively nor preferentially with such company, but rather as an inducement to similar arrangements with other companies or persons upon equal terms and conditions, will be just and right in principle, as well as extremely beneficial to the company. The directors believe that, even during the present half-year, a considerable accession of receipts from such traffic can be obtained, and that it will rapidly increase if properly managed, and add no immaterial amount to the future dividends for the shareholders." 6. The report containing these passages was received and adopted; and, with reference to the matter in these passages more particularly referred to, the following resolution was passed:—"It was resolved, that this meeting approves and sanctions the proposed arrangement for securing to this railway, upon agreed terms of profit, a large and continuous supply of coals in the *383] manner and subject to the *conditions recommended in the two reports presented for consideration this day; and hereby authorizes the directors to conclude such agreements for that purpose as they may deem most advantageous to the proprietors of this company." 7. In pursuance of an assurance given by the chairman of the directors at this meeting, a case was stated for the opinion of counsel as to the legality of entering into the proposed arrangements; and, such opinion having been obtained that the arrangements would be perfectly legal, further negotiations took place between the promoters of the intended company and the directors of the Great Western Railway Company, which resulted in an agreement subsequently reduced into formal shape, and duly executed between the Great Western Railway Company and the company then lately registered in accordance with the provisions of the statute, under the name of "The Ruabon Coal Company (Limited)." 8. That agreement bears date the 31st day of July, 1856, and a copy of it is hereto annexed.(a)

(a) The agreement was as follows:—

An Agreement, made the 31st of July, 1856, between the Great Western Railway Company of the one part, and the Ruabon Coal Company (Limited), being a joint stock company incorporated pursuant to the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), of the other part: Whereas the said Ruabon Coal Company (Limited), hereinafter, called "the coal proprietors," are owners or lessees, or may become owners or lessees, of certain collieries and beds or mines of coal at Ruabon, in the county of Denbigh, from which place the Great Western Railway Company, hereinafter called "the company" merely, have, by means of railways, a continuous and direct communication to London and elsewhere: And whereas it is considered that mutual benefits and advantages may be obtained by the company and the coal proprietors, by carrying coals from the said collieries to Paddington and to other stations on the company's lines, and in their storing and keeping it for the coal proprietors until sold or removed; and the company are willing to afford to the coal proprietors great facilities and advantages in carrying, storing, and keeping the coal, for reasonable freights and charges, in consideration of the coal proprietors guaranteeing to them a constant and regular traffic of coal, for a certain term of years, subject as hereinafter mentioned: And whereas arrangements of the like kind, having regard to the circumstances and the quality of the coal, are intended to be and may from time to time be made between the company and other companies or persons who may be owners or lessees of collieries or beds of coal, or with coal factors and others engaged in the traffic of coal; and the persons with whom at any time and for the time being such arrangements may be in operation, including those parties hereto, are hereinafter collectively designated as the coal consignors: And whereas it is also intended that the company shall make, on behalf of all the coal consignors alike, and

*9. In the interval which elapsed between the time of this agreement and the ordinary half-yearly meeting of the Great Western Railway Company, in February, 1857, questions had been raised, and objections taken, principally, as was believed, by persons *interested in collieries in other districts of the country, as to the arrangement so made with the Ruabon Coal Company; and, in consequence thereof, the directors of the Great Western Railway Company, in their report to the proprietors at that meeting, which was

without distinction, having reference in each case to the quality and market value of the coal, arrangements for the coal sent by them respectively to London being there sold and delivered on account of and by persons acting as the general agents and servants of the various coal consignors respectively, all the charges and expenses of these arrangements being considered as laid out and incurred for the general benefit of all the coal consignors, and being ascertained and apportioned among and borne by them respectively, as hereinafter mentioned: And whereas this agreement is for the purpose of carrying into effect these several proposals and objects, as far as the coal proprietors, parties hereto, are concerned therewith: Now, therefore, it is hereby mutually agreed by the parties hereto, as follows:—

1. This agreement shall come into force on and take effect upon and as from Saturday, the 3d of January, 1857, inclusive, and shall continue in force for the term of ten years from that day, subject to partial suspension and to prolongation and sooner determination, as hereinafter respectively mentioned; but it is agreed that all coal which may have been carried on the railways of the company, within the limits hereinafter mentioned, by the coal proprietors, from the 1st of March, 1856, shall be considered to have been carried at the rates and prices for freights, terminals, wagon hire, and break of gauge and otherwise, hereinafter agreed upon.

2. A year, under this agreement, shall consist of two halves of a year, as next defined. Half a year, under this agreement, shall be reckoned from the Saturday next after the 1st of July, to the Saturday next after the 31st of December, both days inclusive; or, in like manner, from the Saturday next after the 31st of December to the Saturday next after the 1st of July, both inclusive. A month shall be reckoned as four weeks, taken in succession in each half a year, the remaining weeks and days being included in the last month of each half a year; and a week shall be reckoned from Sunday to Saturday, both inclusive.

3. Subject to the provisions hereinafter contained for the partial suspension of this agreement, the coal proprietors are to send over the railways of the company from the said collieries, consigned to stations on the company's railways beyond the distance of one hundred miles from the junction of the railway, with the siding leading to the colliery, such sufficient quantity of coal during each year as will produce to the company as and for freight, terminals, wagon hire and break of gauge, during the continuance of this agreement, except when prevented by the circumstances hereinafter particularly specified, a yearly gross revenue of 40,000*l.*, subject to be increased as mentioned in clause 4, or increased or reduced as mentioned in clause 26: and the minimum quantity to be sent and consigned in each month, so as to make up the said yearly revenue, or the increased or reduced yearly revenue, as hereinafter mentioned, shall from time to time be arranged between the parties hereto, or, in case of disagreement, by the standing referee hereinafter mentioned; it being agreed that all such arrangements shall from time to time be reduced to writing, and shall be signed by some competent person on behalf of the company and the coal proprietors respectively, or by the standing referee as aforesaid, and that the last of such written and signed arrangements shall always be as binding as if the terms thereof had been inserted in this agreement.

4. Subject to the provisions for the partial suspension of this agreement, the coal proprietors agree, at any time after the expiration of one year from the 3d of January, 1857, upon notice in writing given for that purpose by the coal manager hereinafter referred to, and provided the coal then can be sold at Paddington at not less than the minimum prices hereinafter mentioned, to increase the quantity of coal to be sent thereafter to the said stations, so as to produce to the company, from the sources and for the services aforesaid, thenceforth during the continuance of this agreement, a gross revenue of 60,000*l.* per annum, subject to be increased as next mentioned, or to be increased or reduced as mentioned in clause 26; and, in like manner, and sub-

*386] held *on the 15th day of February, 1857, made the following statement:—"The question of rates for the conveyance of coals over the Great Western lines having been raised by an advertisement and circular letters which tend to mislead the proprietors, and to impute *387] to the *board preferential dealings, the directors think the best answer to such misrepresentations, industriously propagated to serve a particular object at this moment, will be, to publish an authorized scale of the rates, as well as the particulars of the system which is in

ject as aforesaid, the coal proprietors agree, at any time after the expiration of two years from the said 3d of January, 1857, upon notice as aforesaid, to increase the supply so as to produce thenceforth during the continuance of this agreement a like gross revenue to the company of 80,000*l.* per annum subject to be increased or reduced as mentioned in clause 26. But it is hereby expressly agreed between and by the parties hereto, that, when the annual gross revenue to be paid to the company under this agreement, or actually so paid, whether or not in consequence of such notice in writing as aforesaid, shall in any one year amount to the gross sum of 60,000*l.*, the sum of 3*d.* per ton shall be allowed to the coal proprietors in account, by way of discount, in respect of such part thereof as shall have arisen on coal carried within the London district; and, in like manner, when the annual gross revenue shall amount to the sum of 80,000*l.* in any one year, the sum of 6*d.* per ton shall be allowed to the coal proprietors in account, by way of discount on the like part; and, in calculating the said sums of 60,000*l.* and 80,000*l.*, the coal proprietors, for the purpose of allowance by way of discount, shall be at liberty to apply the surplus money of any one year towards the deficiency of any other year. It being hereby agreed that such discounts shall be respectively allowed on an average calculated over the whole term of ten years, but shall be allowed yearly, as they accrue. And it is further agreed, that, for the purposes of this agreement, the London district shall be taken as including all stations on the company's railways within twenty-five miles of Paddington, or on any branch the junction of which with the main railway is within twenty-five miles of the said Paddington station.

5. The coals to be sent under the two last preceding clauses shall consist of the best quality of coal, known generally as "yard" coal, and of the inferior quality of coal, known as "wall and bench" coal; and these qualities of coal shall be sent, under the two last preceding clauses, in the proportions following, viz. during the period when the gross revenue shall not exceed 40,000*l.* a year, in the proportion of two-thirds of yard coal to one-third of other coals; during the period when the gross revenue shall, or, but for the making of such reduction as mentioned in clause 26, would exceed 40,000*l.* a year, in the proportion of eleven-twentieths of yard coal to nine-twentieths of other coals.

6. Subject to the proviso in the present clause, the company are to provide and supply to the coal proprietors, at the said collieries, coal-trucks for the carriage of all coal to be sent over the said railways by the coal proprietors, either under the preceding clauses, or to any stations on such railways, beyond the distance of fifty miles from the said junction; and, to this end, the company are on each working day to provide and supply (without requisition) at the said collieries, coal-trucks sufficient for the carriage of at least one twenty-fourth part of the minimum quantity of coal fixed for that month; and, further, whenever notice shall have been given to their traffic manager, not later than the Friday of any week, that the coal proprietors will during the ensuing week require trucks sufficient to accommodate a traffic of a greater number of tons than one twenty-fourth part of the current monthly minimum, then the company are on each working day of the week so ensuing to provide coal-trucks to accommodate the proportion of the traffic to the specified extent, provided the number of tons specified do not exceed 25 per cent. of the quantity of coal apportioned for that week according to the current monthly minimum, beyond which it is to be optional with the company whether they will provide trucks or not, and to what extent. And, further, if at any time this agreement shall be partially suspended, under the provisions hereinafter in that behalf contained, the company are not, during the continuance of such partial suspension, to be bound to provide and supply any coal-trucks as aforesaid beyond such number within the limits aforesaid as shall be actually required, by some such weekly notice as aforesaid, to be supplied during the ensuing week.

*operation, equally and impartially, with every freighter who may be willing to transmit coals over this railway. It will be [*388 appended to this report for the information of all parties desirous of ascertaining the facts. It is perfectly true that a retail dealer who may send single *trucks of coals, or coals in small quantities, when- [*389 ever he pleases, without engagement or obligation of any description to the company, pays more for the single truck than the freighter who engages to provide full train loads adapted to the power of the

7. The coal-trucks are to be supplied at the said collieries with such order and regularity as may provide generally a sufficient number for the average of the working days during the week, the supply not being delayed on the one hand, or too quickly made on the other hand. They are to be such as are suitable to the purpose, and in good repair and condition, and the coal proprietors are not to be liable for their maintenance or repair, beyond the making good any damage or injury caused to the coal-trucks by their own fault or neglect.

8. The coal is to be loaded into the coal-trucks by and at the expense and risk of the coal proprietors, who are also to provide all that is necessary for the purpose. The coal proprietors are also to provide, and maintain in good order, the branch railway and sidings and other conveniences usual and necessary, except motive power for loading and for leading the coal in the trucks between the colliery and the point where it reaches the land belonging to the company near to the junction with the company's railway.

9. For every coal-truck provided by the company, which, after having been for two clear working days properly, under the sixth and seventh clauses of this agreement, at the loading place of the coal proprietors, ready for use by them, shall not be loaded and ready to be taken away by the company, the coal proprietors shall pay a demurrage of 2s. for any time not exceeding twenty-four hours, and 2s. 6d. for every twenty-four hours or fraction of twenty-four hours beyond the first twenty-four hours of detention, to be reckoned from the time when the company shall first be ready, and shall by their servants or agents in that behalf offer in writing to take away the same, until it shall actually be loaded, or, which shall first happen, taken away unloaded. The coal proprietors are also to pay, as demurrage, the same rate of charge for the trucks at the unloading stations, where the company shall have provided depôts and conveniences for unloading the coal, as hereinafter mentioned. Excepting always those stations, at which the business of the coal proprietors shall be conducted by a manager, appointed by the company or by the company's superintendents or station-masters.

10. The coal-trucks so provided and supplied by the company shall, when loaded, be weighed on the machine at the colliery in the presence of a servant of the coal proprietors and of a person to be appointed and paid by the company, which person shall give a receipt to the coal proprietors for the quantity so ascertained; and the correctness of such receipt shall not, unless disputed at the time by the servant of the coal proprietors, afterwards be questioned or disputed; and the company, in consideration of the special notice and circumstances of this agreement, and of the large minimum quantity of coal agreed to be sent over their railways, undertake to be responsible for delivering the same weight (less 5 per cent. for waste and breakage, taken upon an average in each month,) to the agent, or others appointed to receive the coal on the behalf of the coal proprietors at the respective unloading stations. And the company shall with their own engines carry the said coals, and deliver them, according to the consignment of the coal proprietors, to and at the Paddington station, or to and at any other station on the company's lines of railway beyond fifty miles from the aforesaid junction; and the company shall carry and deliver the same with despatch, regularity, care, and attention, and shall remove the loaded wagons from the sidings at the colliery as often as may be agreed upon, so that the regular working of the colliery may not be interrupted by reason of the loaded wagons filling up the sidings. Provided always that the company shall not be bound to carry coal for the said coal proprietors upon the terms of this agreement under any circumstances for a less distance than fifty miles on their railways; but nothing herein contained is to deprive the coal proprietors of their right to send coal at the ordinary rates of carriage for any such less distance.

11. When the quantity of coals sent and consigned by the coal proprietors in a

*390] engine, sent at *all seasons of the year, and for a stipulated annual amount of freight payable to the company. The question really is, whether such rates are disproportional or otherwise, and the publication of the scale will be the best mode of testing it. The *391] directors can say with *confidence, that their sole object has been to secure to the lines the utmost amount of freight from coals carried in the manner most economical and remunerative to the proprietors, and upon one uniform principle, applicable alike to all, and recog-

month to stations beyond the one hundred miles before mentioned, shall be in such proportion as would produce an annual gross revenue of 40,000*l.* as aforesaid, the company shall not be bound to employ for the carriage of them more than seven trains in each week; when the quantity shall be in such proportion as would produce an annual gross revenue of 60,000*l.* as aforesaid, they shall not be bound to employ more than eleven trains in each week; and, when it shall be such as would produce an annual gross revenue of more than 80,000*l.*, they shall not be bound to employ more than fourteen trains in each week, so as to insure that the coal trains supplied shall in all cases be fully loaded.

12. The company are to deliver the coal so carried by them under this agreement into the care of the agents, or others appointed by them on behalf of the coal proprietors for receiving the same. The quantities of coal from time to time carried and delivered for the coal proprietors, shall be correctly weighed, ascertained, and recorded, at the time of the arrival of each train, by the agents or servants of the company and of the coal proprietors present, if any, at the places of unloading; and the result then arrived at shall not be afterwards questioned or disputed according to the quantity so recorded.

13. The company are to provide for the coal proprietors in their stations at Paddington and at such other of the stations upon the company's railways, within the limits of this agreement, as the coal proprietors shall from time to time appoint, by notice in writing to the company's traffic manager, so far as the station and available room of the company then existing and the convenience of all the coal consignors will severally admit of, having regard to the general traffic at such stations, as to which, any question shall, in case of dispute, be referred to the standing referees, good and sufficient and convenient depôts or store places for the separate storing and keeping of the different kinds of coal so sent; and are also (to the like extent) to provide for their use, in common with the other coal consignors, sufficient space for the convenient unloading, receiving, and discharging of the coals; and the coal proprietors, in consideration, of the terminal charge hereinbefore referred to, are to have the use of the same respectively, under proper regulations, for the receiving, unloading, storing, selling, and loading of the coal so sent, and to have free access thereto for themselves and their agents and servants and others duly authorized by them in that behalf, at all reasonable hours for all or any of these purposes.

14. The company are also to provide at the stations last mentioned, for the use of the coal proprietors, in common with the other coal consignors, and to allow them and their agents and servants and others, by their authority, under proper regulations, access to, and use of, the sidings already made, or which may hereafter be made by the company to afford access to the said depôts respectively, and the weighing-machines thereat, and also at the Paddington station, desks, and all other office-fittings and furniture for offices, and are at all times to keep the same respectively in good repair and working order, at their own expense, except that the expense of repairing and making good any damage or injury caused by the act or default of any of the agents or servants appointed by or acting for or on behalf of the coal proprietors shall be paid for by the said coal proprietors.

15. The company are to engage and provide a general coal manager, at the Paddington station, for the purpose of selling the coals, keeping the accounts, and generally managing the whole of the coal business at that station; and also to appoint a sufficient and complete staff of clerks and other persons (who are, however, to be the agents and servants of the coal proprietors) necessary for conducting the business of unloading, stacking, selling, distributing, and disposing of the coals, and collecting and receiving the prices thereof; also to provide, by hire or otherwise, the requisite horses, carts, and other things necessary for the weighing and delivering of the same.

nised as just. It was *sanctioned by the highest opinion of counsel immediately after the last February meeting; and the system has since been confirmed as legal by a recent decision of the Court of Common Pleas.^(a) To this principle *the directors feel it their duty to adhere; and they will rejoice to find that it is extensively adopted by the Somersetshire, Forest of Dean, and all other collieries, whether large or small, under arrangements with this

(a) Referring to Oxlade's Case, 1 C. B. N. S. 454 (E. C. L. R. vol. 87).

16. The company are from time to time to have the appointing, removing, and discharging of the said general coal manager and of all the said staff, without any right on the part of the coal proprietors to interfere therein; and are from time to time to cause such security to be given by each person so appointed for their faithful accounting to the company and to the coal proprietors, as the company may think necessary: and to appoint and prescribe the several duties and functions of such manager and staff, and fix and determine their respective wages and salaries. But such general coal manager and staff, or any individual thereof, shall be removed by the said company, upon the coal proprietors certifying in writing, stating therein reasonable grounds for so certifying, that the said general coal manager, or any one or more of his staff, are or is unfit or incompetent, or neglect to, or do not properly, discharge the duties or functions to be performed by them or him respectively.

17. The general coal manager and staff may act for the other coal consignors besides the other coal proprietors: they are to be considered and treated as acting solely for the coal proprietors, and as their individual agents and servants, and not as the agents and servants of the company, or of any of the other coal consignors; and the coal proprietors are to be solely bound by, and answerable for, the contracts and representations, acts and defaults, of the coal manager and staff when dealing with the coal of the coal proprietors.

18. The general coal manager is to make for and on behalf of the coal proprietors, and, if he shall find it more economical or convenient so to do for them, in common with other coal consignors, all the necessary arrangements at Paddington station for the sale and delivery from the depôts there of the coal; and, for this purpose, may, if so authorized by the company, hire or contract for the use of all necessary horses, wagons, carts, trucks, harness, shovels, sacks, tools, and other requisites for such sale and delivery, the expense of which is to be defrayed as hereinafter mentioned.

19. The general coal manager is also to cause to be kept at the Paddington station all usual and proper books of accounts, and to cause full and accurate entries to be made therein of all sales and deliveries, moneys received, and disbursements, and all other transactions relating to the sale and delivery of the coal proprietors' coal, and the receipt of the proceeds thereof: the coal proprietors, either personally or by their agents duly authorized for that purpose, are to have the right, at all reasonable hours, to inspect or examine all or any entries in the books.

20. The company are to afford all facilities and give all assistance in their power for enabling the coal proprietors, as regards the Paddington station, through and by means of the personal services of the general coal manager and his staff, and, as regards every other station, within the limits of this agreement, through and by means of the services of the manager and staff at such station, by whomsoever appointed, to manage the sale and realize the proceeds of the coal of the coal proprietors, and are to use all means in their (the company's) power for putting all the coal consignors on an equal footing, and affording the like conveniences and advantages to all without favour or distinction.

21. The coal proprietors are to have the continued use of the several depôts, offices, and plant for the purposes of this agreement; and all the provisions of this agreement, as to the keeping, selling, and delivering the coal at and from the same, are to continue in force for a period of twenty weeks, if necessary, after this agreement shall in other respects have been terminated, in order to afford the coal proprietors sufficient time for selling off, or removing the coal then in store; and accounts are to be kept and balance-sheets made out and delivered and adjusted for this extra period upon the same principle and in the same manner as the accounts and balance-sheets respectively hereinafter mentioned.

22. The company are, from time to time, to pay and discharge all the charges and expenses arising out of and incident to the unloading, storing, selling, and delivering

*394] company similar to that which is now in force with *the Ruabon Coal Company." 10. The graduated scale referred to in this report, was a scale which had been prepared and arranged for the express purpose of enabling other persons interested in collieries in any other districts, to carry on an extensive traffic in coals upon *395] similar terms and conditions, even with a lesser quantity than that which had been agreed with the Ruabon company to send, and such scale was calculated, as I believe, to afford to all consignors equal and

at and from the Paddington station, of all the coal consigned by the coal consignors respectively to that station, that is to say, the salaries and wages of the general coal manager and of the staff as aforesaid, and also the charges and expenses of hiring or otherwise providing horses, wagons, carts, trucks, sacks, harness, shovels, tools, books, papers, and other requisites for conducting the business of unloading, storing, selling, and distributing the coals; also any moneys paid or expended for making good or by way of compensation for damage or injury caused by the default or neglect of any of the said staff, and in respect of the tax or duty payable on coal, and in general in or incident to the doing of all things necessary or proper to be done for the unloading, storing, keeping, selling, weighing, loading, and delivering coal, and receiving and collecting the price thereof, as hereinafter mentioned.

23. The company are to keep a separate account, as far as practicable, of each of these various charges and expenses in each half-year against the several consignors, which are to be paid by the several coal consignors respectively; and those charges and expenses which cannot be so separately ascertained shall be taken and charged rateably among all the coal consignors according to the quantity of coal which they may respectively during that half-year have consigned to the Paddington station; and, subject to the next clause, the coal consignors shall pay the same accordingly. But the company shall, out of or towards such charges and expenses, pay or bear the sum of 200*l.* a year towards the salary of the general coal manager, who, in that capacity, will perform several duties on behalf of the company, and also the sum of 50*l.* a year towards the salary of each clerk employed by or acting under such coal manager in collecting the price of coals sold, who will to that extent be necessary and required for the collection and protection of the company's freights earned by the carriage of such coals.

24. The total sums appropriated to the coal proprietors, as aforesaid, in respect of compensation for damage or injury, under clause 22, and also the said charges and expenses at the Paddington station, are to be debited to the coal proprietors, in the quarterly statements of accounts, and are to be repaid to the company by them, as hereinafter mentioned.

25. The rate of charge by way of freight for all the coal carried by the company and delivered under this agreement beyond the one hundred miles before mentioned, is to be seven-sixteenths of a penny per mile per ton of 21 cwt. of 112 lbs. received at the loading-place, to be computed from such loading-place, subject to increase or reduction as hereinafter mentioned; and this charge shall be in full of all rates, tolls, and charges of the company, except those hereinafter mentioned for trucks and terminals, and transfer from the narrow to the broad gauge, up to the time of delivery of such coal at the coal-dépôts, to be provided as aforesaid.

26. In case at any time during this agreement the average selling price of the coal of the proprietors at Paddington, to be ascertained as next hereinafter mentioned, should exceed the sum of 23*s.* 6*d.* per ton for the first quality or yard coal, or shall exceed the sum of 22*s.* 6*d.* per ton for the second quality or wall and bench coal, then, in respect of the coal on which there shall be such excess price, the rate of charge per ton for the carriage of such coal from the collieries to the Paddington station under this agreement, shall be increased by one-half of such excess price; and, in every year in which there shall be such an increase in the rate of charge, the gross revenue of 40,000*l.*, 60,000*l.*, or 80,000*l.*, as the case may be, to be provided in that year by the coal proprietors, shall be increased in like proportion (that is to say) by a sum equal to the amount of the increase made by virtue of the present clause in the charges payable to the company during the same year; and if, on the other hand, the average selling price of the said coal shall be less than 21*s.* 6*d.* per ton for the first quality, or less than 20*s.* 6*d.* per ton for the second quality, then, in respect of the coal on which there shall be such diminution of price, the rate of charge per

fair advantages in respect of carriage and freight of coal over
 *any of the railways of, or worked in connection with, the rail- [*396
 ways of the Great Western Railway Company. 11. The following is a
 copy of such graduated scale, which was extensively circulated, and
 was communicated or became known to all persons *interested [*397
 in the coal traffic passing upon any of those railways, and, among
 others, to the complainants and other coal proprietors of the Forest of
 Dean : (a) —

(a) See next page.

ton for the whole distance to the Paddington station shall be reduced by one-half the difference per ton for the time being between such respective prices of 21s. 6d. and 20s. 6d., or either of them, as the case may be, and the average selling price; and every year in which there shall be such reduction in the rate of charge, the gross revenue of 40,000*l.*, 60,000*l.*, or 80,000*l.*, as the case may be, to be provided in that year by the coal proprietors, shall be reduced in like proportion (that is to say) by a sum equal to the amount of the reduction, made by virtue of the present clause from the charges payable to the company during the same year. Provided always, that the selling price shall, for the purpose of this clause and this agreement, be considered never less than 19s. per ton for coals of the first quality, and 18s. per ton for coals of the second quality. Provided also, and it is further agreed, that no reduction or advance shall be made in the rate of charge for the carriage of the coal from the collieries to stations other than Paddington, whatever may be the selling price.

27. The average selling price for the time being of the first and second qualities of coal of the proprietors, is to be ascertained by taking at the end of each month the actual average of the selling prices of all coals of each kind sold by them at the Paddington station, and delivered in or near the metropolis (adding 2s. per ton to the price of any coal that may be sold to persons carting it away from the station) during that month, and the result so arrived at is to be assumed, for the purposes of all calculations under this agreement, to be the average selling price of their coals for that month. The price at which coal is to be sold under this agreement is to be fixed from time to time between the company and the coal proprietors; and, if any dispute should arise in fixing such, or in arriving at the average selling price as above mentioned, such dispute is to be determined by the standing referee hereinafter mentioned; but the average selling price is not to be ascertained or affected by the selling prices at other stations than Paddington.

28. Whenever the price at which the two qualities of coal hereinafter described, or either of them, can be sold at the Paddington station, shall fall below 19s. and 18s. per ton respectively (the question of price being in the event of dispute decided by the standing referee hereinafter mentioned), it shall be at the option of either of the parties hereto, by notice to that effect given to the other of them, partially to suspend this agreement until such time as the average selling prices shall again be equal to, or more than, 19s. and 18s. respectively, and thereupon this agreement shall be partially suspended accordingly, the incidents and results of every such partial suspension being those which are defined or referred to in clause 35. But the full performance of this agreement shall be again resumed, as of course and without formal notice, on its being certified by the general coal manager to the coal proprietors and the company respectively, that the average selling prices have risen to or above such several amounts as last aforesaid.

29. The coal proprietors are to pay, in addition to the said rates, by way of freight for carriage, a sum of 1s. per ton, in respect of all the coal carried and delivered for them under this agreement to any station within the London district, as defined in the fourth clause of this agreement, and for coal carried and delivered to any shorter distance (exceeding one hundred miles as aforesaid) at the same proportionate rate per mile 1s. bears to 197 miles, as a commuted charge for the use of trucks; and the coal proprietors are, in respect of all coal carried and delivered to and at any railway station under this agreement, to pay a further sum of 1d. per ton for the transfer from the narrow to the broad gauge, when it shall be so transferred, and a further sum of 2d. per ton by way of a commuted terminal charge for the use of the sidings, depôts, offices, and for shunting the wagons at the respective stations, and for all other conveniences and advantages offered by the company, and in addition to those defined by clause 13. It is understood and agreed that the above terminal charge is

*Statement of Total Charge per Ton for Coals over the Great Western
Lines referred to in the foregoing Report :—*

		Per Ton per Mile	
		Freight.	Use of Wagon.
Contract charge in full train loads, for distances exceeding 100 miles. Total freight 5000 <i>l.</i> and upwards per annum for a term		7/16ths of a penny.	1/16th of a penny.
Retail charge in single trucks, for distances exceeding 50 miles, without any engagement for quantity or time		8/16ths of a penny.	2/16ths of a penny.

	CONTRACT CHARGE, FREIGHT EXCEEDING PER ANNUM.						Retail charge for small quantities.
	40,000 <i>l.</i>	30,000 <i>l.</i>	20,000 <i>l.</i>	15,000 <i>l.</i>	10,000 <i>l.</i>	5,000 <i>l.</i>	
	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
Additional charge in each case for terminals and other expenses	0 3	0 6	0 9	1 0	1 3	1 6	1 6
Thus, the total charge, including freight, wagon hire, and other expenses, is, for							
Somersetshire coal Distance 124 miles from Radstock to Paddington . . .	5 5	5 8	5 11	6 2	6 5	6 8	8 0
Forest of Dean coal Distance 128 miles from Bullo Pill to Paddington . . .	5 7	5 10	6 1	6 4	6 7	6 10	8 2
[This may be varied, to some extent, by South Wales railway charges over their line.]							
North Wales coal Distance 198 miles from Ruabon to Paddington . . .	8 6	8 9	9 0	9 3	9 6	9 9	11 10

*12. No coals are delivered to or received by the Great Western Railway Company at Bullo or Lydney, neither of those places [*899 being on any of the lines of the Great Western Railway, but upon the line of the South Wales Railway, over which the Great Western Railway *Company has only such interest and limited share in the work- [*400 ing and management of the traffic passing over it as hereinafter particularly mentioned: 13. The working of all the traffic passing upon or over any part of the South Wales Railway, to or from the Great

made for the accommodation of the unloading stations alone, inasmuch as the loading-place will be on the property of the coal proprietors, who are there to receive and form the trains, subject as to the positions and number of trucks in a train to revision by the company, and there to perform all the work usually included in terminal charges, and who are also to maintain at their own cost the branch line and its sidings and conveniences leading to the junction with the company's railway, and although the company's charge for carrying the coal is to commence from the loading-place, calculated as one mile from Ruabon station.

30. In case in any month during the continuance of this agreement, and subject to the incidents and results of any partial suspension as hereinafter mentioned, the coal proprietors shall send over the railways under this agreement a less number of tons than that arranged as the minimum for that month as hereinbefore mentioned in clauses 3 and 4, they are, nevertheless, to pay for carriage such a sum, calculated on the previous month's work in accordance with clauses 3, 4, and 26, as would be payable on that minimum number of tons if actually sent by them over one hundred miles; and in like manner in case in any half-year during the continuance of the agreement the total of the receipts by the company for carriage shall be less than the minimum amount due for such half-year, in accordance with the conditions contained in clauses 3, 4, and 26, then, subject to the incidents and results of a partial suspension, they are, nevertheless, to pay that minimum amount as if the coal had been actually sent during that half-year over one hundred miles as before mentioned, subject in each case to the provisions herein contained for relieving the coal proprietors from their obligations in this respect under certain circumstances; but the coal proprietors are to be allowed to send at any time or times during the continuance of this agreement, carriage free, so much coal as shall be sufficient to make up the short quantity for the carriage of which they shall have paid under this clause in previous years.

31. As regards coal sent by the coal proprietors over the company's railways between the respective distance of 50 miles and 100 miles from the junction before mentioned, the coal proprietors shall pay to the company for the carriage of such coals the sum of 3s. 9d. per ton, or a sum calculated at the rate of five-eighths of a penny per ton per mile, whichever shall be the less amount, and also 4d. per ton for the hire of trucks for the whole distance, in lieu of all the rates and charges hereinbefore provided for, and in addition thereto 2d. a ton for terminal charges, and 1d. per ton for the transfer of gauge, when actually transferred; but it is agreed that the coals sent under this clause shall not be taken into account in any way in making up the minimum quantities agreed to be sent under clauses 3 and 4, or in producing the gross annual revenue in clauses 3, 4, 26, and 30 of this agreement.

32. As regards all coals of the coal proprietors sent and consigned over the company's railways to the Paddington station under this agreement, and in consideration of the large minimum quantities agreed to be sent on the railway, an allowance shall be made by the company to the coal proprietors equal to one-half of the company's charges for the freight, terminals, wagon-hire, and break of gauge, on all coals in respect of the sale of which any bad debts shall have been made by the coal proprietors.

33. If at any time during the continuance of this agreement the coal proprietors shall be prevented from sending any quantity of coal over the railway by reason of any fault or neglect of the company or their servants, the coal proprietors shall not be answerable to the company for any deficiency which may be thereby caused in the monthly or half-yearly quantities sent by them over the railways, and shall be relieved from their obligations in that respect to the extent by which such deficiency shall be caused by such fault or neglect.

34. If at any time during the continuance of this agreement the coal proprietors

- *401] *Western Railway, including therein the traffic of coals, is managed and conducted by and through the medium of a joint committee, consisting of five directors of the South Wales Railway Company and five directors of the Great Western Railway Company; and such
- *402] *joint committee is an independent and distinct body, the existence and constitution of which is recognised and sanctioned by act of parliament; and the Great Western Railway Company and the board of that company, have no power of themselves to regulate any

shall be prevented from working their collieries and mines, either wholly or to such extent as may be necessary for their sending over the railways beyond the aforesaid distance of 100 miles a minimum monthly quantity for the time being at the least, by reason of a strike or of inability to obtain workmen, or of the collieries or mines becoming flooded, or of any extensive fault, accident, or any circumstance of a substantial character, it shall be at the option of the coal proprietors, by notice in writing to the company to that effect, partially to suspend this agreement until such time as the cause so preventing the carrying out of this agreement shall have ceased to operate; and thereupon this agreement shall be partially suspended accordingly, the incidents and results of every such partial suspension being those which are defined or referred to in clause 35. But the full performance of this agreement shall be again resumed upon the said cause ceasing to operate, and the coal proprietors shall forthwith give notice of the cessation of such cause to the traffic manager of the company.

35. In all cases in which under any of the provisions hereof this agreement shall be partially suspended, the coal proprietors shall be relieved during the period of such partial suspension from their obligation or liability to provide for the company such yearly gross revenue as hereinbefore mentioned, that is to say, whether or not any coal shall during any such period be actually sent by the coal proprietors over the company's railways beyond the aforesaid distance of 100 miles, the coal proprietors shall be deemed and taken to have so sent the minimum during each month of the same period, and after a corresponding rate for any week or day thereof, taking the minimum in each instance as that in force at the time of the commencement of the partial suspension. But, in other respects, the provisions of this agreement shall continue in force notwithstanding any such partial suspension thereof.

36. In the case of any such partial suspension, the period during which this agreement is to continue in force is to be extended with the same provisions and conditions as during the last half-year of the original term, for a further term equal to that during which such partial suspension shall have existed, and so on each occasion of such partial suspension.

37. If the coal proprietors shall become bankrupt or insolvent, or if they shall for the space of six calendar months wholly omit to send any coal over the company's railways under this agreement, whether in consequence of a partial suspension as before mentioned, or of a breach of covenant on their parts, the company may give to the coal proprietors, provided such omission be not caused by or be in consequence of any act or default of the company, three months' notice in writing, requiring them to resume the sending coal over the railways under this agreement beyond the aforesaid distance of 100 miles; and if they shall not, during four weeks thence next ensuing, send over the railways beyond such distance a full and proper quantity of coal under this agreement, the company may thereupon, by a further notice in writing, absolutely determine and put an end to this agreement; but such notice and determination are to be without prejudice to the rights and remedies of the company in respect of any previous breach of covenant by the coal proprietors.

38. The clerks, collectors, or other persons receiving the same are to pay over to the company the moneys from time to time received as the price of coal of the coal proprietors sold at or from the Paddington station.

39. Within fourteen days after the expiration of each month, the company are to pay over, by way of advance to the coal proprietors, in such manner as the coal proprietors may from time to time direct, three-fourths of the net value of their coal consigned to the Paddington station, after deduction of the charges for freight, trucks, terminals, transfer from narrow to broad gauge, and of coal-depôt expenses at Paddington, calculated at the rate of sales during the previous month; and, for the purpose of such estimate, the said coal-depôt expenses for that month are to be assumed

*traffic passing over the South Wales Railway or any part thereof, or to fix or alter the rates or charges for the carriage of the same, but such rates and charges are fixed by the said joint committee quite independent of any rates or charges paid or made by *the Great Western Railway Company for or in respect of the traffic over their own proper lines of railway; and it was for this reason, that, in the statement hereinbefore referred to as the graduated scale, the scale of charges as to the Forest of Dean coal is

to have been at the same rate as for the month preceding, the amount of which shall be calculated by the company as nearly as may be accordingly to their judgment and belief, and within fourteen days after the end of each month.

40. The company are to make out and to deliver or send to the coal proprietors within twenty-one days, a full, clear, and correct account, under this agreement, for each such month, showing therein for each week the number of tons carried, the respective distances to which they were carried, the deficiency (if any) of the week charged for, though not carried, the tonnage rate for that week, the amount of the charges upon the number of tons carried, and on the further quantity so charged for, the demurrage (if any), and any other special expenses chargeable against the coal proprietors, the amount received by the company, and the amount paid over by them to the coal proprietors as before mentioned; and if within fourteen days after the receipt of any such account the coal proprietors shall object to any item or items therein, the question in difference, as to the item or items so objected to, shall (unless it can be settled by the parties hereto by agreement between themselves) be referred to and settled by the standing accountant for the time being, as hereinafter mentioned; and the certificate in writing of such standing accountant shall, without any formal award, be binding and conclusive on the parties hereto respectively, as to the matters so referred to him. The item or items not objected to within such last-mentioned period, or the whole account if no item be objected to, shall be thenceforth treated as having been settled and adjusted, and shall not be reopened or questioned for any purpose whatsoever, unless there shall be therein an intentional or fraudulent misstatement.

41. Within ten days after the end of each three months during this agreement, and also within ten days after the expiration of the additional period allowed for selling off or removing the coal in the dépôts, the company are in like manner to make out and deliver, or send to the coal proprietors at their principal office or place of business for the time being, a full, clear, and correct account and balance-sheet for the three months, or such other period, showing therein the total number of tons carried in the three months, and the amount of charges upon the weekly quantities sent or charged for, the deficiency (if any) to be charged for, although not earned, and the amount charged on this deficiency, the total of all the amounts charged for weekly deficiencies, the total amount of demurrage for the three months, the total of the coal-dépôt expenses for that period at the Paddington station, and the proportion thereof to be borne by the coal proprietors, the total amount of any extra charges or expenses to be borne by the coal proprietors, the total amount of money received by the company in the half-year, the total amount paid over by them to the coal proprietors, the discounts and other credits (if any) to be allowed to them, and the balance on the whole account payable over to the coal proprietors, or payable by them to the company, as the case may be; and the coal proprietors in like manner to render quarterly accounts to the company of any claims and charges they may have against them.

42. No question or objection shall be made as to the accuracy of any such quarterly account, except as regards the amount of the coal-dépôt expenses, and as to its being a correct summary of the monthly accounts; and if within ten days after the final settlement or adjustment of all monthly accounts standing open at the time of the delivery of any quarterly account, the coal proprietors shall object that such account is not a correct summary of the monthly accounts, as finally settled and adjusted, such question is, unless settled by agreement between the parties hereto, to be referred to and settled by the standing accountant, in the same manner as any question or dispute upon a monthly account. In the absence of any such questions or objections being made within the time last mentioned, the quarterly account shall be thenceforth treated as having been settled and adjusted, subject to any subsequent

- *405] *stated to be subject to variation to some extent by the charge over the South Wales Railway; and the Great Western Railway Company have urged upon the said joint traffic committee to agree upon equal mileage rates over the South Wales Railway in respect of coals
- *406] *sent in considerable quantities from the Forest of Dean, and they have been unable to induce the said joint committee to consent thereto: 14. Although the Great Western Railway Company receive the entire freight for the coals carried from Bullo or Lydney

alteration of the amount or proportion of coal-depôt expenses as hereinafter mentioned; and, if referred to arbitration, shall be in like manner binding and conclusive upon both parties as settled and adjusted by the standing accountant, subject to the like alteration with regard to the coal-depôt expenses, and shall not be reopened or questioned except in case of fraud or intentional misstatement.

43. If the coal proprietors shall, within ten days after the delivery to them of such quarterly account, or if any other of the coal consignors shall, within the time limited by their respective agreements (which time shall in no case exceed by twenty-one days the time allowed to the coal proprietors for the like purpose), object to the amount or apportionment of the coal-depôt expenses, the question so raised is in all cases to be referred to the standing referee hereinafter mentioned, and the coal proprietors or any other of the coal consignors may come in as parties to such reference or not as they shall think fit, and the decision and certificate of such standing referee upon the question so referred shall be binding and conclusive, as well upon the coal proprietors and the company, as upon all the other coal consignors, whether they shall have come in as parties to such reference or not: and all quarterly accounts and balance-sheets into which such coal-depôt expenses enter as an element, shall (if necessary) be amended in accordance with such decision and certificate: but the account and apportionment respectively stated in any such quarterly balance-sheet shall be final and conclusive on all the coal proprietors, unless objected to by them or some other of the coal consignors within the times limiting them respectively for making such objection.

44. The balance upon every such quarterly account, whether against or in favour of the coal proprietors, is to be paid by the party against whom it stands, to the other, within fourteen days after the final settlement and adjustment of such quarterly account and balance-sheet, and, if not so paid, may be recovered by the party entitled to it, from the other, by action of debt in any of the superior courts of common law.

45. If, at any time, whether during the continuance of this agreement or afterwards, before the final settlement of all accounts and claims under it, any question or dispute or difference shall arise between the parties hereto as to the meaning of this agreement, or as to the fact or intent of any breach of it by either party, or as to the damage or compensation to be paid to the other party for such breach, or as to any other matter or thing arising out of this agreement, every such question, dispute, or difference, unless a mere matter of account, such as is hereinbefore directed to be referred to and settled by the standing accountant, shall be referred to the standing referee for the time being, and his decision therein shall be final and conclusive on both parties, and they shall respectively do and concur in all acts and matters for giving effect and validity to such reference and decision.

46. The standing referee for the period from the date of this agreement to the 31st of December next, shall be J. W. K., of, &c.; and, in the month of December in this and each following year, until the final determination of this agreement, an impartial and competent person shall be appointed, either by agreement between the company and the coal consignors, or, if they shall be unable to agree in such appointment on or before the 15th of December, then by the director of the metropolitan school of science applied to mining and the arts for the time being, on behalf of all parties, to be the standing referee under this agreement during the next year; and the person so appointed shall accordingly be the standing referee from the 1st of January then next for the space of one year, unless he shall die, decline to act, or become incapable of acting, in the happening of any which events another is to be appointed in the same manner, to hold the office until the end of the year, who shall have the same powers in all respects as the original referee, and so on (toties quoties); and any question which at the end of the year for which any standing referee was appointed

over *any portion of the Great Western Railway, this is done merely for convenience, and is accounted for in common with [*407 other through freight, by arrangements with and to the South Wales Railway Company: 15. The South Wales Railway Company are in no way interested, nor *do they participate directly or indirectly in- [*408 the coal traffic from the Ruabon Coal Company, and have no voice or share in any arrangements affecting that traffic: 16. By the returns of the traffic made up to the 31st December, 1856, it appears that the

shall be pending before him and then undetermined, may be heard and decided by them as if such year had not expired.

47. If from any cause the appointment of a standing referee for the next ensuing year shall fail to be made, the then referee shall continue to be the standing referee for such ensuing year, as if newly appointed.

48. The standing accountant under this agreement, for the period from the date hereof to the 31st of December next, shall be the said J. W. K., and thereafter the same provisions shall apply to the appointment of a competent and qualified person to be the standing accountant for each successive year as are hereinbefore made for the appointment of a standing referee.

49. The Great Western Railway Company, for themselves, their successors and assigns, hereby covenant with the Ruabon Coal Company (Limited), their successors and assigns, that they, the Great Western Railway Company, their successors and assigns, shall and will do and perform all things hereinbefore contained which are by them or on their behalf to be done and performed; and the Ruabon Coal Company (Limited), for themselves, their successors and assigns, hereby covenant with the Great Western Railway Company, their successors and assigns, that they, the Ruabon Coal Company (Limited), their successors and assigns, shall and will do and perform all things hereinbefore contained which are by or on behalf of the coal proprietors to be done and performed.

50. Provided always, that any breach of this agreement by either party shall be the subject of compensation, by way of damages, to be ascertained, if any doubt arise as to the amount, by the standing referee herein appointed, on any complaint made to him by either party, and to be paid as he shall direct; it being agreed that the performance of any stipulation on either part shall not be considered as a condition precedent to the due performance of all the stipulations by the other party, but simply a matter of compensation. Provided also that nothing herein contained shall be construed as creating any participation by the Great Western Railway Company in any profit or loss from the sale of the said coals so to be carried as aforesaid, or as constituting the said company partners in interest in any respect with the coal proprietors in relation to the sale or disposition of such coals. Provided also, that, if at any time during the continuance of this agreement, any clause, article, covenant, proviso, or condition herein contained, shall, by a court of competent jurisdiction, be held or adjudged to be illegal or beyond the power or competency of the Great Western Railway Company, this agreement shall not be avoided or determined thereby, but the clause, article, covenant, proviso, or condition so held or adjudged to be illegal or ultra vires, or, if more than one, each of them, shall thereupon become and be inoperative and ineffectual, and this agreement shall be read and construed as if no such clause, article, covenant, proviso, or condition, were contained therein; and fresh alterations in or modifications of this agreement, if any, as may be required by reason of the rejection or omission thereof, shall be forthwith made as may be advised by the respective counsel of the company and of the coal proprietors, or, in case of their not agreeing, by some third counsel to be nominated by them, or, failing the nomination, by the Attorney-General for the time being; and if, by reason of such rejection or omission of, or such alteration or modification, either of the parties hereto shall claim to be entitled to any compensation, and the other of them shall dispute such claim, or they shall be unable to agree as to the kind or amount of compensation to be made, the question in the first of these cases, whether any, and, if any, what compensation, and in the second of these cases, what compensation shall be made, and how and in what way it shall be made, to the party claiming the same, shall stand referred to and be determined by the standing referee.

The supplementary agreement was as follows:—

A Supplementary Agreement, made the 31st of July, 1856, between the Great

*409] total *quantity of South Wales coal, including Forest of Dean coal, conveyed by the South Wales Railway from Bullo and Lydney, and brought to the Great Western Railway, has been substantially as large since the making of the agreement with the Ruabon Coal *410] Company as it was *before that agreement; but, if the sale and supply of the said coal to London, or to any other particular stations on the Great Western Railway to which access is also afforded by the line of the Great Western Railway Company for Ruabon coal, has been at all affected by the agreement, it has been so affected, not by reason of any undue preference or advantage afforded to the Ruabon Coal Company, but to the superior quality of the coal raised from the Ruabon collieries as compared with coal of the like kind supplied from the Forest of Dean, and also to the lower cost of the best coal at Ruabon over that raised from the Forest of Dean: 17. The said coal company

Western Railway Company, hereinafter called "the company" merely, of the one part, and the Ruabon Coal Company (Limited), hereinafter called the coal proprietors, of the other part: Whereas, an agreement bearing even date herewith has been entered into between the company and the coal proprietors, whereby certain arrangements to continue in force for the period of ten years from the time therein indicated were made for the carriage of the coal of the coal proprietors over the Great Western Railway to Paddington, and certain other stations as therein defined, and for the storing and disposing of such coal at these places; and it was, amongst other things, thereby agreed that the company were to engage and provide a general coal manager at the Paddington station for selling coals, keeping the accounts, and generally managing the whole of the coal business at that station, and to appoint a sufficient and competent staff of clerks and other persons (who were, however, to be the agents and servants of the coal proprietors) necessary for conducting the business of unloading, stacking, selling, distributing, and disposing of the coals, and for collecting and receiving the prices thereof at Paddington: And whereas the company have consented, at the request of the coal proprietors, for their temporary accommodation, to allow their superintendents at the stations, other than at Paddington aforesaid, on their railways, within the limits of the said recited agreement, to act for a limited period as the agents of the coal proprietors for managing the sale of their coals there; therefore it is hereby agreed by and between the said parties hereto, that, for a period of twelve months from the commencement and taking effect of the recited agreement, and for a further period after the expiration of that time, terminable by either party giving to the other of them three months' notice in writing, the company will allow their superintendents at the several stations to which coals may be consigned under the said recited agreement, other than Paddington aforesaid, to act as the agents of the coal proprietors, and for them and on their account to manage the sale of the coals received at such stations respectively by or for the coal proprietors, and, so far as they may from time to time direct or require, to do all such acts, matters, and things for that purpose, and in relation thereto, as may be done under the terms of the said recited agreement by the general coal manager at the Paddington station as aforesaid; and that, in consideration of such services, the coal proprietors will pay for the services of such superintendents respectively while so acting, 3d. per ton on all coals sold at the said stations, the aggregate sum so paid to be distributed among such superintendents in such manner and proportions as the directors of the company may think proper and determine. Provided that an account of the actual expense of and incident to the unloading, storing, selling, and delivering of the coals of the coal proprietors at each of such stations, and of collecting and receiving the prices thereof, shall be kept by the superintendents there respectively, and that the company shall in all cases be reimbursed by the coal proprietors all moneys that shall be paid or expended in respect of the services and matters last aforesaid beyond or in excess of the sum made up of the said payment of 3d. per ton. And it is agreed between the parties thereto that the provisions of the said recited agreement respecting the settlement of accounts and disputes by the standing accountant and standing referee mentioned in or to be appointed under such agreement, shall be applicable and apply accordingly to the settlement of accounts and disputes arising hereunder.

was framed under the circumstances hereinbefore mentioned; and, *although the formation of such company was encouraged by the directors of the Great Western Railway Company with a view to the development of the coal traffic over their railways, as hereinbefore mentioned, yet the said company was and is wholly independent of the Great Western Railway Company; and many of the proprietors thereof are altogether independent of, and some have no connection with, that company: 18. No undue preference or partiality has been knowingly or intentionally exhibited by the Great Western Railway Company to or in favour of the Ruabon Coal Company to the prejudice of other persons, or in favour of the traffic of the Ruabon coal; nor is the Forest of Dean coal subjected to any undue or unreasonable prejudice or disadvantage: and the same terms and conditions which are agreed and acted upon with the Ruabon Coal Company, are open and have been publicly offered to all other coal proprietors who may be desirous of sending coals in like manner over the railways of the Great Western Railway Company: 19. In consideration of the large quantity guaranteed to be sent annually and regularly in full train loads from the Ruabon collieries over the Great Western Railway, the charge per mile is less for coals conveyed from the Ruabon colliery than for coals conveyed in smaller quantities from the Forest of Dean collieries; but the circumstances justify such lower charge per mile, and, under like circumstances, and subject to the like conditions, the Great Western Railway Company are willing, and have offered, to make the same reduced charge per mile to all other coal proprietors; and the actual freight of coals conveyed from the Forest of Dean collieries to London without any contract for quantity is less than the freight paid by the Ruabon company under their agreement, owing to the nearer proximity of the said Forest of Dean collieries to London: 20. *The trade or demand for coals at Bullo and Lydney has not been in any way injured by any such supposed undue preference or advantage; and, if such trade has been injured, it is only by reason of the competition with a better article sold at the pit's mouth at a lower price. [The affidavits then proceeded to explain or deny the allegations as to the preferences given to the Ruabon Coal Company in respect of the alleged supplies of stationery, the advertising, the employment of porters, station-masters, and clerks, payment of salaries, and passes.] 28. The Ruabon Coal Company are held strictly to the period of forty-eight hours allowed for unloading, and a demurrage account is kept against them for any excess or delay: 29. According to the difference of circumstances, the charges are fairly proportionate; the mere question of distances affords no certain criterion as to the reasonableness of the relative charges. For distances under fifty miles, the ordinary rates are charged to the Ruabon Coal Company, and, for distances less than one hundred miles, higher rates in proportion are charged to them than for distances exceeding one hundred miles. And this is a well-known and usual principle of charge adopted by railway companies. The rates on the table or schedule annexed to this my affidavit (see next page) are the rates now in force for coals brought to the several places mentioned in such table, from Bullo or Lydney respectively; and, having regard to the fact that there is in these cases no special contract for a considerable quantity to be sent annually and regularly, or for the loading

Rates for Carriage of Coal from Bullo Pill and Lydney, showing the Great Western and South Wales Companies' Proportions respectively.

To	BULLO PILL.										LYDNEY.								
	Private Trucks.					Company's Trucks.					Private Trucks.						Company's Trucks.		
	Total distance.	Great Western proportion.	South Wales proportion.	Through rate.	per ton.	Great Western proportion.	South Wales proportion.	Through rate.	per ton.	Total distance.	Great Western proportion.	South Wales proportion.	Through rate.	per ton.	Great Western proportion.	South Wales proportion.	Total rate.	per ton.	
Paddington . . .	127	5/9½	0/11½	6/9	7/1	6/7	1/-	8/1	134	5/10	1/3	7/1	1/4½	8/6	7/1½	1/4½	1/4½	8/6	per ton.
Bull's Bridge . .	116	5/4½	0/11½	6/4	6/7	6/7	1/-	7/7	123	5/5	1/3	6/8	1/4½	8/-	6/7½	1/4½	1/4½	8/-	per ton.
Reading . . .	92	4/4½	0/11½	5/4	5/3½	10½	6/4	5/11	98	4/5	1/3	5/8	1/4½	6/9	5/4½	1/4½	1/4½	6/9	per ton.
Oxford . . .	84	4/0½	0/11½	5/-	4/10½	10½	5/11	5/11	91	4/1	1/3	5/4	1/4½	6/4	4/11½	1/4½	1/4½	6/4	per ton.
Swindon . . .	50	2/7½	0/11	3/7	3/3½	10½	4/4	4/4	57	2/8	1/3	3/11	1/5	4/8	3/3	1/5	1/5	4/8	per ton.

of full train loads, as is the case with the Ruabon Coal Company, the rates so charged are in every respect fair and reasonable as compared with the rates charged under the special circumstances aforesaid to the Ruabon Coal Company: 30. It appears from returns made, that the average receipts per ton for the tonnage of all coal sent from Bullo or Lydney to *stations on the Great Western Railway, including [*414 terminals, is 4s. only, whilst the average receipts per ton for the carriage of the Ruabon coal sent to stations on the Great Western Railway, including terminals, is 8s. 1d.: 31. As to the charge for terminals, the charge made to the complainants on the conveyance of coals from the Forest of Dean, is the ordinary station-to-station terminal charge of 1s. 6d., and for this charge accommodation is afforded as well at the loading as at the unloading stations; and such charge is apportioned between the Great Western Railway and the South Wales Railway Companies: the smaller charge on Ruabon coals for terminals is made partly in respect of the large quantity annually consigned, and partly because the work of moving the trucks and forming the train, as well as loading the coal, is performed on the sidings and property of the Ruabon Coal Company, and at their expense; and a proportionate reduction of the usual charge is and has been offered to all other consignors of coal, according to the quantity which they may respectively contract to send annually over the railway: 32. The agreement as to the allowance in respect of bad debts made in London only, is consistent and reasonable, having regard to the fact that the coals are to be sold and delivered by a general agent acting for the railway company, as well as for all owners of coal who may wish to employ him for the same purpose, and that, in such capacity, as receiving the freight payable to the railway company, he would have no interest in preventing the sale of coal to improper or insolvent customers if the entire loss were to fall on the coal company whether they receive the money or not; and it is therefore a just as well as a necessary precaution that the railway company receiving the freight should participate to some extent in the loss occasioned by bad debts so far as their freight is concerned; and the railway company, if no such *allowance were made, would have a [*415 distinct interest in as large a quantity as possible being sold, regardless of payment, inasmuch as every shilling which is earned by the Great Western Railway Company, by increasing the quantity of such traffic to London, beyond the actual expenses, is a new and additional gain to them and their shareholders: 33. The Great Western Railway Company not only professes to be but is ready to enter into agreements with other coal consignors on the same terms as those contained in the agreement with the Ruabon Company, in which agreement provision is actually made for other coal consignors participating in the benefit of the agreement; and, moreover, for the accommodation of those who might not be able or willing to guarantee the consignment of so large a minimum quantity per annum, they have provided and offered the graduated scale before mentioned, varying the charges according to quantities, on the same principle as has been adopted in the case of the Ruabon Coal Company, and as has been and is acted upon by the Great Western Railway Company in other instances; but the complainants as traders of the Forest of Dean have refused, although proposed to them, either to adopt such graduated scale or to bind themselves to send any

specified quantities of coals to, upon, or over the Great Western Railway. [The affidavit then went on to assert that the principle of the agreement was fair and equitable.] 36. The obligation imposed upon the Ruabon Coal Company by the agreement to send full train loads is strictly enforced; and, although the trains are occasionally broken up at Wolverhampton, where there is a break of gauge, or at Didcot, for despatch to different stations, yet this is done solely for the convenience of the Great Western Railway Company, and the coal company have no concern or part in it: the obligation on the coal company to send the coals *416] in full train loads is a great advantage to the Great Western Railway Company, inasmuch as it utilizes to the greatest practicable extent the engine-power employed in this traffic, and on the other hand it prevents unnecessary interference with the passenger trains and other traffic, by diminishing the number of such coal trains: it also enables the Great Western Railway Company to appropriate trucks for such special service, and to keep such trucks in active and constant employ: 37. No undue preference or advantage is given to the Ruabon Coal Company, to the prejudice or disadvantage of the complainants or the other traders of the Forest of Dean: and it would be inexpedient and unjustifiable as respects the interest of the Great Western Railway Company itself that any impediment or obstruction should be imposed on the traffic of coals from any district because it may compete with some other district, the object and the interest of the railway company being to encourage such traffic to the utmost extent, and to give all reasonable aid to its increase and development to all persons and from whatever district it may be derived: 38. The Great Western Railway Company have not nor ever had any interest in the success or failure of the Ruabon Coal Company, except as regards the freight upon the conveyance of such coal; and their only object in promoting the coal traffic from the collieries in the Ruabon district was, to benefit their own proprietors by means of such a profit to be derived from traffic.

A further affidavit of Grierson stated, that, in consequence of the steep gradients between the Gloucester and Swindon stations of the Great Western Railway, coal coming from the Forest of Dean or other places on the South Wales Railway cannot be carried in such heavy train loads as coal can coming from West Bromwich, through which place the Ruabon coal comes; that the coal coming from the said South *417] Wales Railway, after it has arrived at Swindon, has been and is carried beyond Swindon in the most advantageous way for the railway company, either by its being sent on in a train by itself, or, if there is not enough to form a full train, then it is attached to goods trains; and that, if, in consequence of the said Ruabon Coal Company's full train loads having been broken up by the said Great Western Railway Company, any South Wales coals can be sent on by the train from Ruabon, it is so sent from Didcot, as a matter of economy and convenience to the Great Western Railway Company.

It was referred to one of the masters to report upon such points as should be settled by one of the judges.^(a) These were afterwards settled by Williams, J., and were as follows:—

(a) Before the master an affidavit in reply was used by the complainants. The only material parts of this affidavit were the second and fourteenth paragraphs. The former stated that "the

1. Whether the Great Western Railway Company have entered into any and what agreement or arrangement with the Ruabon Coal Company (Limited) for the carriage of coal from Ruabon, and what are the terms and details thereof. The master to be at liberty *to suppress any part irrelevant in his opinion to the present inquiry. [*419]

2. The master to report any facts relevant to the question whether the Great Western Railway Company have given or give any and which of the preferences or advantages specified in the affidavits to or in favour of the traffic in coals from Ruabon, or to or in favour of the Ruabon Coal Company (Limited), which have not equally been given, or are not equally given, to or in favour of the complainants: and also whether the said Great Western Railway Company subject the traffic in coals from Bullo and Lydney, or either of them, or the complainants for or in respect of the carriage of coals for them by that company, to any and what of the prejudices or disadvantages specified in the affidavits.

3. Whether the Great Western Railway Company have carried or carry coals from Ruabon on any and what terms different from the terms on which the company have carried and carry coals from Bullo and Lydney for the complainants, as suggested in the complainants' affidavits.

4. Whether there is any and what difference, as affecting the cost of carriage, between the circumstances under which the said railway company have carried or carry coals for the Ruabon Coal Company, and the circumstances under which they have carried or carry coals for the complainants.

In Easter Term last, the master made his report, as follows:—

"The parties have been before me, and the case was conducted on either side by filing affidavits only. The affidavits are those of J. B. Nicholson, one of the complainants, and of Aaron Goold and John Trotter, in support of the motion; and of Charles Alexander Saunders, secretary to the Great Western Railway Company, William Lister Newcombe, goods manager of *the Great Western Railway, James Grierson, late goods manager of the Great Western Railway at Wolverhampton and for the district including Ruabon, and now general goods manager of the company, and of John Hogg, in opposition to the motion. (a) [*420]

sale and supply of Forest of Dean coal have been materially affected to our injury by reason of the undue preferences and advantages afforded to the said Ruabon Coal Company, and not in consequence of the quality or cost thereof, as compared with that of the said Ruabon Coal; and the latter that "the complainants' trade and the trade in coal from Bullo and Lydney is not small, irregular, and intermittent, but large, regular, and constant; and, to the best of the deponents' belief, exceeds in quantity the coals sent by the Ruabon Coal Company."

Appended to this affidavit was a table professing to give a correct statement of the distances coals are carried on the Great Western Railway, and the tonnage and other rates charged from and to the several places mentioned. See the table, next page.

(a) Mr. Grierson's affidavit contained the following passage,— "That, in consequence of the steep gradients between the Gloucester and Swindon stations of the Great Western Railway, coal coming from the Forest of Dean or other places on the South Wales Railway cannot be carried in such heavy train loads as coal can coming from West Bromwich, through which place the Ruabon coal comes. The coal coming from the said South Wales Railway, after it has arrived at Swindon, has been and is carried beyond Swindon in the most advantageous way for the railway company, either by being sent on in a train by itself, or, if there is not enough to form a full train, then it is attached to goods trains; and if, in consequence of the said Ruabon Coal Company's full train loads having been broken up by the said Great Western Railway Company, any South Wales coal can be sent on by the train from Ruabon, it is so sent from Didcot as a matter of economy and convenience to the Great Western Railway Company."

"It appears from the affidavits of Nicholson, Goold, and Trotter, that Nicholson and his partner are extensive dealers in and purchasers of coal in the Forest of Dean, that Goold and his partner are proprietors of and work extensive mines in the forest, and that Nicholson and Goold and their partners raise annually many thousand tons of coal, the greater portion of which they send to Bullo, on the South Wales line, to be carried on that line and the Great Western, and to be delivered by the Great Western Railway Company to their agents at or near to the various stations on the Great Western; that Trotter and his partners are also lessees of and work extensive coal-mines in the forest, and that they also transmit annually large quantities of coal to Lydney, on the South Wales Railway, *to be carried on and to be delivered by [*421 the Great Western in a similar manner.

"The position of the railways is as follows:—The Great Western, commencing at London, proceeds to Didcot, and thence to Swindon and Bristol; a branch from Swindon goes to Gloucester, where it is joined by the Gloucester and Forest of Dean Railway, which the Great Western work as lessees. The latter line proceeds to Grange Court, in Gloucestershire, where it is joined by the South Wales Railway, which runs thence to Bullo (five miles), and Lydney (twelve miles), both of which places are near to the Forest of Dean, and have a good station each. The traffic over any portion of the South Wales line to or from the Great Western, is managed by a joint and distinct board of ten directors, consisting of five directors of the South Wales Railway Company, and of five directors of the Great Western Railway Company, and these directors have a joint power only to fix the rate of charges. The Great Western company, for convenience sake, receive the freight for the coal which is carried over any portion of their line from Bullo and Lydney, and account for it to the South Wales Company, in common with other through freight. From Didcot, the Great Western runs through Oxford to Birmingham, and the line thence to Ruabon, in Denbighshire, is worked by the Great Western Company; the Great Western having also various branches, viz. to Uxbridge, Windsor, High Wycombe, Hungerford, Basingstoke, and Weymouth. It is only by means of the Great Western and South Wales Railways that the Forest of Dean coal can be sent by rail to London and to the southern and western parts of England, and to the various stations on the western line; and Bullo and Lydney are the nearest points on the South Wales line to the coal-mines in the forest. To these places the complainants have, *since the [*422 opening of the line, sent annually many thousands of tons, to be carried thence and by the Great Western Railway to their stations, for which purpose the complainants have expended considerable sums of money.

"In 1856, a joint stock company (limited), with a nominal capital of 50,000*l.*, and 28,700*l.* paid up, was formed for the purpose of working certain coal-mines at Ruabon. On the 21st of July, 1856, this company was duly registered under the name of 'The Ruabon Coal Company (Limited).'

"With this company the Great Western Railway Company entered into a certain arrangement hereinafter mentioned, since which time the former company have been actively engaged in raising and sending coal along the Great Western line.

"As to the first point, I find that the Great Western Railway Company did enter into an agreement or arrangement with the Ruabon Coal Company (Limited), and that such agreement or arrangement is embodied in two instruments annexed to the affidavit of Mr. Saunders (antè, p. 383, n.). Both parties contend that the whole of these agreements are material to the present inquiry, and I am unable to suppress any part of them.

"As to the second point, I find that the Great Western Railway Company have acted on the above-mentioned agreements, and have acted throughout and still act upon the agreement of the 31st of July, 1856; but the terms and provisions of the said agreements have not been extended to the complainants. The Great Western Railway Company have offered to enter into a similar agreement with the complainants, and upon the same terms, but the latter have refused to accept the same, alleging that it is impossible for them to enter into such an agreement.

*423] "The following graduated scale of rates was *appended to a report made by the directors of the Great Western Railway Company to their proprietors at a meeting held on the 15th day of February, 1857. This scale was extensively circulated, but the complainants refused to adopt it, although it was proposed to them (see opposite):—

"The complainants allege that the Great Western Railway Company give undue preference to the Ruabon company, to the prejudice of themselves, in the following matters, some of which are in addition to those matters which are contained in the agreement, and that such privileges and benefits are not allowed to them. And it appears,—First, that the Great Western Railway Company supply the Ruabon company with stationery, viz. with certain printed headings of invoices, bills, and the like, headed with the name of the Great Western Railway Company, which is done for convenience, and that the expense is borne by the consignees under the agreement before referred to,—Secondly, that, by the permission of the Great Western Railway Company, the Ruabon company placarded the stations of the Great Western with advertisements of the coal and the price; and that the ticket offices of the Great Western Railway are furnished with circulars of the coal company for distribution. It appears that the company and directors have nothing to do directly or indirectly with this, except in granting the same permission as is conceded under similar circumstances to other traders who may have coals to sell,—Thirdly, that the porters of the railway company are employed in unloading the trucks of the Ruabon company, and of weighing the coal into their customers' carts. It appears that the same thing is done, when required by consignees, in the case of all goods carried at mileage rates, and that the time the porters are engaged *425] is charged to the Ruabon company at the price of *labourers' work,—Fourthly, that, by the permission of the railway company, its station-masters and clerks are employed by the Ruabon company to effect sales and to seek orders for them. This is the subject of the supplemental agreement (antè p. 409 n.). This was a purely experimental arrangement, intended to continue for one year only, for the immediate accommodation, of the Ruabon company, who, at their first formation, had no regularly organized agents to undertake the sale of their coals; and minutes of the Great Western Railway Company and

"Statement of Total Charges per Ton for Coals over the Great Western Lines.

		Per Ton per Mile.	
		Freight.	Use of Wagon.
Contract charge in full train loads, for distances exceeding 100 miles. Total freight 5000 <i>l.</i> and upwards per annum for a term }		7/16ths of a penny.	1/16th of a penny.
Retail charge in single trucks, for distances exceeding 50 miles, without any engagement for quantity or time }		8/16ths of a penny.	2/16ths of a penny

	CONTRACT CHARGE, FREIGHT EXCEEDING PER ANNUM.						Retail charge for small quantities.
	40,000 <i>l.</i>	30,000 <i>l.</i>	20,000 <i>l.</i>	15,000 <i>l.</i>	10,000 <i>l.</i>	5,000 <i>l.</i>	
	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>
Additional charge in each case for terminals and other expenses	0 3	0 6	0 9	1 0	1 3	1 6	1 6
Thus, the total charge, including freight, wagon hire, and other expenses, is, for							
Somersetshire coal							
Distance 124 miles from Radstock to Paddington . . .	5 5	5 8	5 11	6 2	6 5	6 8	8 0
Forest of Dean coal							
Distance 128 miles from Bullo Pill to Paddington . . .	5 7	5 10	6 1	6 4	6 7	6 10	8 2
[This may be varied, to some extent, by South Wales Railway charge over their line.]							
North Wales coal							
Distance 198 miles from Ruabon to Paddington	8 6	8 9	9 0	9 3	9 6	9 9	11 10

Ruabon boards had passed to the effect that the arrangement should terminate in August, 1857, and that it would in consequence terminate at that time,—Fifthly, that under the agreement of the 31st of July, 1856, the Great Western Railway pays 50*l.* a year towards the salary of each collecting clerk employed in reference to coals sent by the Ruabon company. It appears, that, in so doing, the clerks would be collecting the freight due to the company, for which service, if separately performed, the company would have to pay more,—Sixthly, that, by the agreement of the 31st of July, 1856, the Ruabon Company are allowed forty-eight hours to unload their trucks, free of charge; but that the complainants are only allowed twenty-four to unload theirs, and are charged for excess of that time, and without any notice in writing.

“As to the third point, I find that the terms upon which the Great Western Railway Company have carried and carry coals from Ruabon are contained in the agreements above referred to, the terms of which agreements have been acted upon, and the first agreement has been throughout and is still acted upon, enforced, and carried out by the Great Western Railway Company.

“A scale showing the distances coals are carried on the Great Western Railway, and the rates per ton *(of 21 cwt.) at which they *426] are charged to the Ruabon company under the agreement, and also the distances coals are carried, and the rates per ton (of 20 cwt.) at which they are charged to the complainants, and the difference between the rate of charge to the Ruabon company and that made to the complainants, is shown in the table annexed to one of the affidavits of complainants.(a) The scale annexed to the affidavit of Mr. Saunders (antè, p. 398) also shows the rates of charges from Bullo and Lydney.

“As to the fourth point, I do not find any facts relevant to it.”

The Attorney-General, Montague Smith, Q. C., and John Gray, in Easter Term last, showed cause.—The complainants are the owners and consignors of coals which are brought from their collieries at Bullo and Lydney, in the county of Gloucester, by the Great Western Railway, to various stations on their line between those places and London. The parties said to have been preferred are the Ruabon Coal Company, who send their coal from Ruabon, in Denbighshire,—the distance from which place to Didcot, where they join the trunk or main line of the Great Western railway, is 143 miles, which, added to 53 miles, the distance from Didcot to London, makes the whole transit 196 miles. From Lydney to Didcot is 82 miles, and consequently the whole distance from Lydney to London is 135 miles. It appears that the Great Western Railway Company charge to the Ruabon Coal Company for the carriage of their coal 7/16ths of a penny per ton per mile, and to the complainants and others who send coals from the Forest of Dean 8/16ths of a penny. They also make a difference in the charge for terminals,—the use of stations, and the making up and starting trains,—charging the complainants at the rate of 1*s.* 6*d.* per ton, and the Ruabon Coal *427] Company *(who have their own sidings and load their own trucks) 2*d.* per ton only. The Ruabon Coal Company was established a few years since, at a time when the traffic in coal became of great importance to the interests of railway companies; and many of

(a) This table was found to be slightly inaccurate, and therefore was not relied on.

its shareholders are officially connected with the Great Western Railway Company. That, however, makes no difference: the real question will be, whether or not an undue and unreasonable preference has been given to the Ruabon Coal Company under the agreement set out in the affidavits filed in answer to this rule. Under that agreement, the Ruabon Coal Company, for a comparatively trifling advantage, engage to send their coals in full train loads, and in such quantities as will produce to the railway company a yearly revenue of not less than 40,000*l*. The first answer to the application, therefore, is, that, upon the authority of *Ransome's Case*, 1 C. B. N. S. 437 (E. C. L. R. vol. 87), and *Oxlade's Case*, 1 C. B. N. S. 454, it is perfectly competent to a railway company to enter into a special agreement for the carriage of goods for a particular individual or company at a lower rate in respect of large quantities of goods and longer distances, than for one who sends them in small quantities and shorter distances. It is necessarily one of the incidents of capital, to enable its possessor to trade to greater advantage than one whose command of money is limited. The two cases above referred to fully bear out the principle here contended for. Upon three other grounds, this application, it is submitted, is completely answered. In the *Caterham Case*, 1 C. B. N. S. 410 (E. C. L. R. vol. 87), it was distinctly held, that, to constitute an "undue or unreasonable preference" within the 17 & 18 Vict. c. 81, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the *same* line or the *same portion* of the line. Here, the lines from Ruabon to Didcot and *from Lydney to Didcot, are totally distinct, running through different districts, and differing essentially as to gradients and [*428 otherwise. Unless the two lines are identical, there are no means of instituting a comparison. How can the Bullo and Lydney proprietors be said to be subjected to undue prejudice because they are charged 1/16th of a penny per ton per mile more than the Ruabon Coal Company are charged for the conveyance of their coals over another line of railway? [CROWDER, J.—Both lines are branches of the Great Western Railway.] To Grange Court only: beyond that is the South Wales Railway, over which the Great Western Railway Company have no control. In the *Caterham Case*, Cresswell, J., says: "By the act of parliament in question, very extensive powers are conferred upon this court,—powers which may be exercised for the benefit of the public, but which may also be exercised to the great detriment of those who are engaged in carrying on railway concerns; and therefore the court should be very cautious, before they set on foot an inquiry, to ascertain that there is reasonable ground for believing that the provisions of the act have been infringed. Four several grounds of complaint have been urged in this case. The first is, that the companies against whom the application is directed make unequal charges to persons travelling along their lines to the Caterham branch. It does not, however, appear that there is any inequality of charge to persons using the same portion of those lines: and it is not sufficient to show an inequality as compared with the rates charged on another line. The words of the 2d section of the act are, that 'no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any

*429] respect whatsoever, nor shall any such *company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' I apprehend that it cannot be said, that, because persons may travel between London and Epsom at a less rate than they can between London and Caterham, any undue or unreasonable preference or advantage is given, or any undue or unreasonable prejudice or disadvantage imposed. I can see nothing upon the affidavits to show that any undue preference has been given to any particular person or company. All persons, it appears, who come from London to Caterham are charged alike." So, here, all persons who wish to send coals from Ruabon to London in similar quantities and under similar guarantees, would be charged precisely the same rates as are charged to the Ruabon Coal Company. The next answer to the motion is, that there is no preference in point of fact here: the company profess to carry for all the world alike, regard being had to quantity, full train loads, and distances. The next answer is quite peculiar to this case. The portion of the line between Grange Court and Lydney,—twelve miles of the eighty-two,—does not belong to the Great Western Railway Company, but to the South Wales Railway Company. The terms, therefore, upon which coals can be carried on that portion of the line do not depend upon the Great Western Railway Company. Several minor points are disposed of by the master's report: these matters all range under one head,—equivalents for the advantages which the railway company derive from the contract.

Bovill, Q. C., Manisty, Q. C., and Dowdeswell, in support of the rule.—There is nothing either in the affidavits or in the master's report to show that there exists such a difference of circumstances here as to

*430] *warrant the great difference in the rates charged to the complainants and other coal proprietors of the Forest of Dean, as compared with those charged to the Ruabon Coal Company. The scale (*antè*, p. 418) is so arranged as totally to destroy the trade of the complainants, by annihilating a portion of the district, giving a manifest and unjustifiable preference to the North Wales coal. In this respect, the case is not unlike *Oxlade's Case*, 1 C. B. N. S. 454 (E. C. L. R. vol. 87), where the court held that the desire to introduce the northern coke into Staffordshire afforded no justification for the lowering of the company's rates in favour of the persons dealing in that article. *Cresswell, J.*, in giving the judgment of the court upon that part of the case, says, —1 C. B. (N. S.) 496 (E. C. L. R. vol. 87),—"It appears that 'a desire to introduce the northern coke into Staffordshire' induced the company to make three special agreements with different parties for the carriage of coal and coke at a rate lower than their ordinary charge. We think that the desire to introduce the northern coke into Staffordshire was not a legitimate ground for making such agreements. Lowering their rates *for that purpose* was giving an undue preference to that traffic." Now, what does the master find here? The fourth question submitted to him was, "whether there is any and what difference, as affecting the cost of carriage, between the circumstances under which the said railway company have carried or carry coals for the said Ruabon Coal Company, and the circumstances under which they have carried or carry coals for the complainants." And as to this the master says,—“I do not find any facts

relevant to this point." [CROWDER, J.—Saunders's affidavit discloses circumstances of difference, which the master seems to have overlooked.] The affidavit does not state that the difference in price is consequent upon the Ruabon coals being carried in full train loads: and it is obvious that *that would not justify the discrepancy which appears from the [*431 table antè p. 419. There we find that the charge for conveying the North Wales coal from Ruabon to Banbury, a distance of 112 miles, including terminals and the use of trucks, is 4s. 10d., and from Ruabon to Cookham, a distance of 177 miles, 7s. 9d.; whereas, the charge for the South Wales coal from Lydney to Cookham, a distance of 112½ miles, is 8s. 10d.,—from Lydney to Maidenhead, a distance of 110½ miles, 7s. 4d.,—from Lydney to Banbury, a distance of 113½ miles, 7s. 6d.,—from Bullo to Banbury, a distance of 106 miles, 7s. 2d.,—from Bullo to Cookham, a distance of 105 miles, 8s. 7d.,—and from Bullo to Windsor, a distance of 111 miles, 7s. 4d. Again, the charge for conveying coal from Ruabon to London, a distance of 189 miles, professedly is 8s. 6d. per ton, but in reality 7s. 3d. per ton; whereas, the charge is the same (8s. 6d.) from Lydney to London, a distance of 133½ miles only; and 8s. 1d. from Bullo to London, a distance of 126 miles. [CROWDER, J.—The real question is, whether the special agreement between the Great Western Railway Company and the Ruabon Coal Company is warranted by the special circumstances under which it was entered into.] The burthen lies on the company to show that the inequality of the charge is justifiable. [WILLES, J.—It is for the applicant to make out a *prima facie* case of inequality: but, the *prima facie* case being made out, the onus is cast upon the company to justify the charge.] Now, the 31st clause of the agreement (antè p. 400, n.) fixes the charge for carrying the Ruabon coal over the Great Western Railway between the distance of 50 miles and 100 miles from the Ruabon junction, at 3s. 9d. per ton, "or a sum calculated at the rate of 5/8ths of a penny per ton per mile, whichever shall be the lesser amount," with 4d. per ton for trucks, 2d. per ton for terminal *charges, and 1d. per ton for the transfer of gauge. Seventy- [*432 two miles at 5/8ths of a penny per ton per mile on a full train-load would be 3s. 9d.; consequently, 3s. 9d. would be the charge per ton to the Ruabon company for any distance beyond 72 and within 100 miles. To the complainants the charge is uniformly 8/16ths of a penny per ton per mile: and, as nearly all the traffic in the South Wales coals is within 100 miles of Grange Court, the proprietors of that description of coal are deprived of their natural advantage of proximity to those places. To say that the company are willing to carry for us upon the same terms as for the Ruabon company beyond the distance of 100 miles, is not doing equal justice: we do not want to go 100 miles. The object of this is manifest from the third paragraph of Saunders's affidavit, antè, p. 380. The other provisions of the agreement giving various facilities and advantages to the Ruabon Coal Company which are not afforded to the complainants or to others in their position, clearly amount to an infraction of the provisions of the statute. The explanations afforded by Saunders's affidavit tend rather to show that all this was a mere pretence, for the purpose of preferring the Ruabon Coal Company and their traffic to the complainants and their traffic: and the result must be, the total destruction of the very valuable mining property

in the whole of the Forest of Dean. In this respect, the present case differs very little from that of *Ransome v. The Eastern Counties Railway Company*, 4 C. B. N. S. 135 (E. C. L. R. vol. 93). There, the company made a scale of charges for the carriage of coals from Peterborough and Ipswich respectively to various places, the effect of which was to diminish the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expense of carriage) in favour *433] of the latter a certain portion of the distance between *Peterborough and those places: and this was held to be an undue preference of the Peterborough dealers over those of Ipswich. [WILLES, J.—Is there anything in the affidavits to show the value of the special agreement to the Great Western Railway Company?] Not one word. [CROWDER, J.—Can the Great Western Railway Company be held responsible for a difference of charge upon different branches?] It is true, the two descriptions of coal come from two different places; but both branches belong to the same company. Why is a preference to be given to the traffic from Ruabon over that from Grange Court? The same objection might have been urged in *Ransome's Case*, 1 C. B. N. S. 437 (E. C. L. R. vol. 87). In the *Caterham Case*, 1 C. B. N. S. 410, all persons travelling by the same route were charged at the same rate: and Williams, J., in his judgment, says,—“If it could be distinctly shown that the excess of charge on the Caterham branch was owing to a design on the part of the other companies to exclude the Caterham Railway Company from the benefits to be derived from the use of their lines, that would bring the case within the act.” In *Harris v. The Cockermouth and Workington Railway Company*, 3 C. B. N. S. 693 (E. C. L. R. vol. 91), a railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway: they also made a further reduction under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of their traffic: and it was held that neither of these *434] was a justifiable *reason for the “undue preference” thus given. The dictum of Crowder, J., in the *Caterham Case*, 1 C. B. N. S. 422 (E. C. L. R. vol. 87),—“The meaning of the act, as it seems to me, is, that railway companies shall so conduct their traffic that no undue preference shall be given to, and no undue prejudice imposed upon, any particular person or company, and that these words refer to persons and companies using the line from the same point of departure to the same point of arrival,”—was not necessary to the decision. [CROWDER, J.—If Didcot were the terminus, I presume you would not say that the North and the South Wales coals were carried over the same line. Is there any explanation of the arbitrary fixing of the 100 mile distance, which the complainants say excludes them from nearly all the places they trade with?] None. [CROWDER, J.—Swindon, Didcot, and Reading are within the 100 miles.] They are so: but all the other places are

beyond. The agreement with the Ruabon Coal Company is based upon revenue, not upon quantity. *Cur. adv. vult.*

CROWDER, J., delivered the judgment of the court:—

This was an application by Messrs. Nicholson, coal-owners in the Forest of Dean, for an injunction to restrain the Great Western Railway Company from giving undue preference to the coal traffic of the Ruabon Coal Company as against the coal traffic of the coal-owners of the Forest of Dean: and several grounds of complaint are set forth in the affidavits upon which the rule was obtained.

Affidavits having been filed on the other side, and also affidavits in reply by the complainants, the matter was referred to the Master to report upon certain points settled by my Brother Williams. The case was argued before my Brother Willes and myself. We *think the Master's report disposes of all the alleged grounds of undue [*435 preference except those arising out of the special agreement.

The main ground of complaint is, that the Great Western Railway Company did, on the 31st of July, 1856, enter into an agreement with the Ruabon Coal Company, by which numerous advantages (all reducible to a money value) were secured to the coal traffic of the Ruabon Coal Company on the line of the Great Western Railway, as against the coal-owners of the Forest of Dean, and greatly to the prejudice of their trade in coals conveyed on that line.

The complainants in their affidavits rely much on the history of the Ruabon Coal Company,—showing its formation by two or three persons who were intimately connected with the Great Western Railway Company, and who held five hundred out of five hundred and seventy-four shares in the Ruabon Coal Company: and the complainants charge the railway company with entering into stipulations in the special agreement, calculated to promote the interest of the coal company, without regard to the interest of the railway company: and they further allege that this agreement was kept secret from the complainants. They then set forth in the affidavits various advantages secured to the coal company by the agreement, in connection with the conveyance of coal along the Great Western Railway,—all of which, as is admitted on both sides, are capable of pecuniary valuation, and therefore in effect diminish the rate of carriage of coals to the Ruabon Coal Company, and thus give them an advantageous position in the market.

The affidavits in answer positively deny any community of interest on the part of the railway company with the coal traffic of the Ruabon Coal Company, or that the railway company has any interest in the success or failure of the coal company, except as regards *the freight on the conveyance of the coal; and allege in unqualified [*436 terms that the only object of the railway in promoting the coal traffic from the Ruabon collieries has been to benefit their own proprietors by means of a railway profit derivable from such traffic. It is also positively denied that there was any secrecy intended in the special agreement; and it is alleged that an offer of a similar agreement was made to all other consignors of coals on the Great Western line.

The agreement is set out at full length; and it thereby appears that the consideration moving the Great Western Railway Company to allow the various advantages complained of, was, the engagement by the Ruabon Coal Company to send for ten years along the Great Western line of

railway beyond the distance of one hundred miles such a sufficient quantity of coal during each year as would produce to the company for freight, terminals, wagon-hire, and break of gauge, a yearly gross revenue of 40,000*l.* in fully loaded coal trains, at the rate of seven per week.

On a careful review of the affidavits on both sides, we think it sufficiently appears that the Great Western Railway Company, in entering into this agreement, had only the interests of the proprietors in view, and the legitimate increase of the profits of the railway.

It has been said by this court in the case of *In re Ransome*, 1 C. B. N. S. 452 (E. C. L. R. vol. 87), "that, in considering the question of undue preference, the fair interests of the railway ought to be taken into the account." In that case, the decision was against the railway company, only because it appeared to be the manifest object of the railway company, in charging different rates, to enable one set of coal-owners to compete with another set. And, in the case of *In re Oxlade*, 1 C. B. N. S. 454 (E. C. L. R. vol. 87), the decision was also against the *437 railway company, because the lowering the rates appeared to *be solely from a desire "to introduce northern coke into Staffordshire."

When the statute speaks of "undue and unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage," it uses language implying that there may be advantage to one person or one class of traffic, and prejudice to another, which would not be within the act of parliament. The preference and prejudice must be "undue" or "unreasonable," to be within the statute. And, although, in the case now before the court, it is quite manifest that the Ruabon Coal Company have many and important advantages in carrying their coal on the Great Western Railway, as against the complainants and other coal-owners in the Forest of Dean, still the question remains, are they "undue" or "unreasonable" advantages? This mainly depends upon the adequacy of the consideration given in return to the railway company for the advantages afforded to the Ruabon Coal Company.

The affidavits on the part of the railway company assert, that, regard being had to the large quantity sent by the Ruabon Coal Company, the distance of passage over the line, and the regular full coal trains made up for its conveyance, there is a greater remuneration to the railway company per ton per mile for such carriage at the lower rate, and with the advantages afforded, than for carrying the complainants' coals at the higher rate. Mr. Saunders, the secretary of the Great Western Railway Company, referring to an interview between the directors of the railway company and the representatives of the coal traders of the Forest of Dean, in the 35th paragraph of his affidavit, states "that the only substantial point of difference between the traders and the railway company, is this,—that the company proposed and insist upon a scale graduated under a contract in respect of quantities and distance, and for full *438] loads, whilst some of the traders insist upon a scale graduated according to distance only, without contract for quantity, and corresponding in point of mileage only according to distance with the charge made to the Ruabon Coal Company for a corresponding distance, however small the quantity carried, and under whatever different circumstances as to loads or otherwise it may be supplied for conveyance; and that this is a principle which is not and cannot be recognised or admitted

by railway companies without serious loss and prejudice to their interest; that the guarantee of a large traffic enables them to work such traffic with greater economy by the arrangement of trains and times, and by a special organization of service and constant use of plant adapted to such traffic; and that there is a better remuneration or profit to the railway company per ton from a large, regular, and constant traffic carried on at a less rate, than from a small, irregular, and intermittent traffic carried at a higher rate."

The only answer given to this paragraph by the affidavits of complainants in reply, is in paragraph 14,—“We say that our trade, and the trade in coal from Bullo and Lydney, is not small, irregular, and intermittent, but large, regular, and constant, and, to the best of our belief, exceeds in quantity the coals sent by the Ruabon Coal Company.”

Again, Mr. Saunders, in the 29th paragraph of his affidavit, refers to the several instances of preference alleged by the complainants to be given to the Ruabon Coal Company, in the 34th, 35th, 36th, 37th, 38th, and 39th paragraphs of their affidavit, and says, “that, according to the difference of circumstances, the charges are fairly proportionate; that the mere question of distances affords no certain criterion as to the reasonableness of the relative charges; that, for distances under fifty miles, the ordinary rates are charged to the *Ruabon Coal Company, and that, for distances less than one hundred miles, [*439 higher rates in proportion are charged to them than for distances exceeding one hundred miles; and that this is a well-known and usual principle of charge adopted by railway companies.

The table of rates is then referred to; and the 29th paragraph concludes thus,—“that, having regard to the fact that there is in these cases no special contract for a considerable quantity to be sent annually and regularly, or for the loading of full train loads, as is the case with the Ruabon Coal Company, the rates so charged are in every respect fair and reasonable, as compared with the rates charged under the special circumstances aforesaid to the Ruabon Coal Company.”

The whole of this paragraph is left entirely unnoticed by the affidavit of the complainants in reply. Had the complainants disputed this alleged “well-known and usual principle of charge,” or had they by their affidavit called in question the allegation in this paragraph that the rates charged without agreement are fair and reasonable, as compared with the lower rates charged under the special agreement with the Ruabon Coal Company, regard being had to the different rate of cost of carriage to the railway company, the court would have felt bound to submit these matters to a detailed investigation by an engineer or traffic manager of a railway, who would be able, by calculations, to arrive at a satisfactory result, upon the principle recognised by railway companies, of obtaining the greatest quantity of work from an engine, at the least expense.

Mr. Saunders, in paragraph 19 of his affidavit, while admitting the existence of the special agreement with the Ruabon Coal Company, says “that the circumstances justify such lower charge per mile, and that *under like circumstances, and subject to like conditions, [*440 the Great Western Railway Company are willing and have offered to make the same reduced charge per mile to all other coal proprietors.”

The complainants, in their first affidavit, paragraph 44, and in the

affidavit in reply, say that it is impossible for them to enter into an agreement with stipulations like those contained in the special agreement with the Ruabon Coal Company. Why it is impossible, they do not say. But, in the course of the argument, great stress was laid by their counsel upon the fact that there are several places within the distance of one hundred miles from Bullo and Lydney on the Great Western Railway to which the complainants send their coals, and that the Ruabon Collieries are at a greater distance than one hundred miles from any of the places on the line to which *they* send *their* coals, and that consequently it was impossible for the complainants to stipulate for the sending of coals so as to take advantage of the diminished rate above the distance of one hundred miles.

It was strongly urged before us, that the reason for fixing upon the distance of one hundred miles, was, because the railway company knew that the principal traffic of the Forest of Dean was not to London, which is beyond the hundred miles, but to the intermediate stations within that distance.

But it is to be remarked that no sentence of the complainants' affidavits is directed to that point: nor is there to be found in them an allegation that any large portion of their traffic lies within the hundred miles.

The learned counsel for the complainants relied on the 30th paragraph of Mr. Saunders's affidavit, from which, certainly, an inference to that effect may be drawn. The existence, however, of such a fact would *441] only be material as tending to show that the special *agreement made with the Ruabon company, and offered to all consignors of coals, was only a cloak for concealing undue favour and partiality to the Ruabon Coal Company in their coal traffic.

Had the complainants intended to rely upon this point, they ought to have specifically referred to it in their affidavit, in order that an opportunity for explanation might have been afforded to the Great Western Railway Company.

If we could see clearly that a scale of rates with reference to distance had been framed with the view, and having the effect, of favouring the Ruabon coal traffic, and prejudicing the Forest of Dean coal traffic, we should hold it to be an undue preference within the act, in accordance with the decision of the court in *Ransome v. The Eastern Counties Railway Company*, 4 C. B. N. S. 135 (E. C. L. R. vol. 93). But we have no sufficient evidence to lead us to such a conclusion: and, although the complainants may suffer by this scale of rates, in consequence of their local position, that is a matter which the court cannot interpose to remedy.

It was also contended by the learned counsel for the complainants, that it was impossible for them to accept the agreement in the terms offered, because they were unable to guarantee so large a traffic as would yield 40,000*l.* freight annually.

Now, according to the construction we put upon the act of 17 & 18 Vict. c. 31, it is not contravened by a railway company carrying at a lower rate in consideration of a guarantee of large quantities and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the

diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee.

*The result is, that this rule must be discharged, with costs. [442
Rule discharged, with costs.

ATKINSON, Appellant, SELLERS, Respondent. Nov. 30.

To constitute a "traveller" within the meaning of the 18 & 19 Vict. c. 118, s. 2, it is not necessary that the party should be journeying on business.

THIS was a case stated by two justices acting in and for the county of Lancaster, for the opinion of this court, in pursuance of the statute 20 & 21 Vict. c. 43.

The appellant, Matthew Atkinson, was summoned and appeared before the justices upon an information and complaint laid by the respondent, John Sellers, and which charged the appellant,—For that he, on the 6th of June, 1858, at the township of Garston, being then and there a housekeeper duly licensed to sell exciseable liquors by retail to be drunk and consumed in his house and premises there situate, and the said day being Sunday, did unlawfully open his said house for the sale of beer between the hours of three and five of the clock in the afternoon, to wit, at four o'clock in the afternoon of the said day, otherwise than to a traveller or to a lodger in the said house and premises, contrary to the form of the statute in such case made and provided.

The charge was made under the 18 & 19 Vict. c. 118, s. 2. The license and other preliminaries to the alleged offence were duly proved.

The house kept by the appellant, and referred to in the information, is about five miles and a half from Liverpool, and is much resorted to by parties from Liverpool and the neighbourhood. It was proved on the part of the complainant (the now respondent) that a police officer in private clothes, on the day in *question, and within the hours [443 mentioned in the information, entered the defendant's (the now appellant's) house. The door was closed, and the appellant looked through a trap-door at each party, but the officer did not hear whether he asked any questions or not. The officer found five men there: and it was proved, that beer was served to four of them. It was proved, on the part of the complainant, that none of the men lived in Garston or the neighbourhood. The evidence of the officer was admitted to be true by the appellant.

On the part of the appellant, the four persons to whom beer was served were called; and it was proved that they had come in two parties with ladies, who were in the grounds attached to the house. *Each party had left Liverpool about two o'clock in the afternoon, for pleasure, in a vehicle, and had driven a round of eight to ten miles before arriving at Garston.* They drove their horses and vehicles into the appellant's stable-yard, and ordered meal and water for the horses, and then themselves went into the house for refreshments. It was proved that the fifth man was an inhabitant of Liverpool: no evidence was given as to how he got to Garston; but to him no beer had been supplied. *It was proved that the appellant asked each of the four par-*

ties whether they were travellers, and admitted them on receiving an affirmative answer.

It was contended, on the part of the appellant, that the case against him was not proved, because it was not shown that the parties to whom he had opened his house for the sale of beer were not "travellers" within the meaning of the exception in the act of parliament, and also because it was shown affirmatively, as he argued, that they *were* "travellers" within such exception.

The case then proceeded as follows,—

*444] "We thought we were bound to convict, and *accordingly we convicted the appellant, and fined him 20s. and costs; and the grounds of our said decision were, that we thought, that, taking as we do take, the evidence on both sides to be true, *we could not hold that there was any evidence that the parties to whom beer was supplied were travellers, or that there was any deficiency of proof on the part of the prosecution.*

"The said Matthew Atkinson being dissatisfied with our determination, and having applied to us in writing, within three days^(a) after such determination, to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of the Court of Common Pleas, and having duly entered into the recognisance, and performed all the preliminaries required by the statute 20 & 21 Vict. c. 43; and we having first intimated our opinion, that, under the 1st section of the lastly above-mentioned act, we had no power to grant a case, as we did not consider it a point of law, at the urgent request of the appellant and his counsel, and we being desirous of obtaining a decision as to who are travellers, we granted a case, and now hereby state the same, in compliance with such application, and request the opinion of the court, whether, upon the facts stated in this case, we were bound to convict the said Matthew Atkinson; and we pray the court to make such order therein as the court shall think right."

*445] *L. Temple*, for the appellant.^(b)—The question for *the decision of the court is, what is a traveller? [COCKBURN, C. J.—The object of the statute was, to prevent public-houses from being opened for the sale of beer and liquors between the hours of three and five on the Sunday afternoon. A man goes from Liverpool to a place of entertainment a few miles off for the mere purpose of being entertained,—is he a traveller?] The 2d section of the 18 & 19 Vict. c. 118, the clause upon which this conviction took place, enacts that "it shall not be lawful for any licensed victualler, or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or any person licensed or authorized to sell any fermented or distilled liquors,—or any person who by reason of the freedom of the mystery or craft of vintners of the city of London, or of any right or privilege, shall claim

(a) See as to the computation of the three days, *Peacock, app., The Queen, resp.*, 4 C. B. N. S. 264 (E. C. L. R. vol. 93).

(b) *Welsby*, for the respondent, claimed the right to begin, in accordance with the practice of the Queen's Bench and Exchequer: but the court disallowed his claim, at the same time intimating an intention to confer with the judges of the other courts upon the subject.

See *Gardner, app., Whitford, resp.*, 4 C. B. N. S. 665, 672 (E. C. L. R. vol. 93), where the court said they would adhere to the practice prevailing here in appeals from revising barristers and from county courts, of allowing the appellant to begin. The recent change in the constitution of the court may probably lead to an uniformity of practice in this respect. In county court appeals, the appellant begins in all the courts.

to be entitled to sell wine by retail, to be drunk or consumed on the premises, in any part of England or Wales,—to open or keep open his house for the sale of or to sell beer, wine, spirits, or any other fermented or distilled liquor, between the hours of three and five o'clock in the afternoon, nor after eleven o'clock in the afternoon, on Sunday, or on Christmas Day, or Good Friday, or any day appointed for a public fast or thanksgiving, or before four o'clock in the morning of the day following such Sunday, Christmas Day, Good Friday, or such days of public fast or thanksgiving,—*except to a traveller or a lodger therein.*" The words of the exception in the repealed act, 17 & *18 Vict. c. 79, s. 1, were, "except as refreshment to a bonâ fide traveller or a lodger [446 therein." This difference of language shows that the legislature did not intend that so strict a definition should be applied to the word "traveller" under the new act as under the old one. The real object of the statute was, to prevent tipping during the ordinary hours of Divine service: it never could have been intended to apply to one who is on a journey, whether of business or pleasure. Here, it was proved that all the parties were strangers to the appellant; and, before any refreshment was supplied, they were severally asked whether they were travellers. [COCKBURN, C. J.—The mere fact of his having made that inquiry, per se, gives him no immunity. The 2d section of the 18 & 19 Vict. c. 118 expressly prohibits the party from opening or keeping open the house during the time named, and upon that an exception is ingrafted. It lies upon the person who relies on the exception to show that he falls within it. He must, if he chooses to do what the act of parliament prohibits, exercise due caution.] What more can he do than inquire whether the person who demands admittance is a traveller? If he refuses to open his door to a traveller, he is liable to be indicted: *Rex v. Ivens*, 7 C. & P. 213 (E. C. L. R. vol. 82): and it is no defence for the innkeeper, that the guest was travelling on a Sunday,—travelling on Sunday not being illegal: *Sandiman v. Breach*, 7 B. & C. 96 (E. C. L. R. vol. 14), 9 D. & R. 796 (E. C. R. L. vol. 22). [COCKBURN, C. J.—Do you say that a mere inquiry of the party satisfies the exception?] It is submitted that it does. [CROWDER, J.—I do not see, I must confess, what other means the publican can have at the moment of ascertaining whether the person presenting himself is or is not entitled to refreshment. The only real distinction in my opinion is, between a man living in the neighbourhood or at a distance. Whether he is travelling *for [447 pleasure or upon business cannot make any difference.] Very little light is thrown upon the matter by the dictionaries. In the Imperial Dictionary, by Ogilvie, "to travel" is said to be, "to walk, to go or march on foot, to pass, to journey over;" and "travel" is, "a passing on foot, a walking; journey; a passing or riding from place to place;" and "a traveller" is defined to be "one who travels in any way." In Johnson, a "traveller" is described as "one who goes a journey," "a wayfarer," "one who visits foreign countries." In Richardson, "to travel" is defined thus,—"to go or pass a wearisome length of way; to take or make a toilsome or laborious journey; to journey, to go or pass (on foot or in carriage) along the way, the road, through a country,—over the sea." And in Webster, a "traveller" is described as "one who travels in any way; one who visits foreign countries."

Welsby, for the respondent.—Who is a “traveller” within the meaning of this act of parliament, must be a question of fact for the justices to determine in each case. But it would be very desirable to have some sort of definition by which they may be guided for the future. The course of legislation upon this subject is somewhat curious. The 11 & 12 Vict. c. 49 contained a prohibition in substantially the same terms as that now in question, the exception being, “except as refreshment for travellers.” Next came the 17 & 18 Vict. c. 79, s. 1, where the phrase is varied, “except as refreshments to a bonâ fide traveller, or a lodger therein. Then comes the present act, which leaves out the word “bonâ fide,”—“except to a traveller or to a lodger therein.” [WILLIAMS, J.—You surely do not mean to say that there is any difference between a “traveller” and a “bonâ fide traveller?”] At all events, it *448] lies upon the publican to show that the party is a traveller: *and it can hardly be said that a man who for mere pleasure drives four or five miles from his home is a traveller. [CROWDER, J.—Is a person the less a traveller because he travels for pleasure?] Each case must necessarily depend upon its own circumstances.

COCKBURN, C. J.—As the legislature have thought fit to use an ambiguous term, and there is no explanatory section, we can only apply our minds to the facts submitted to us: and, upon these facts, it seems to me that the appellant ought not to have been convicted. Of course, a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But, if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, and the innkeeper is justified in supplying it. For these reasons, I think this conviction was wrong, and must be quashed, but without costs.

The rest of the court concurring,

Conviction quashed.

*449] *The MUTUAL LOAN FUND ASSOCIATION v. SUD-
LOW. Nov. 4.

A. obtained an advance of money from a loan society upon the security of the joint and several promissory note of himself and the defendant (who to the knowledge and on the requirement of the society signed the same as surety) and of a bill of sale of A.'s furniture. Certain instalments of the note being in arrear, the lenders seized and sold the goods of A. under the bill of sale, and afterwards sued the defendant for the balance:—Held, that it was competent to the defendant to show 1, way of equitable defence, that, but for the mismanagement of the plaintiffs' agents, the goods of A. would have realized sufficient to satisfy the whole debt.

THIS was an action by the payees against the maker of a promissory note for 91*l.*, payable by instalments.

The defendant pleaded,—fourthly, by way of equitable defence, that the said note was the joint and several note of the defendant and one Edward Tongue, in consideration of a loan by the plaintiffs to the said Edward Tongue on the security of the said note and a bill of sale by the said Edward Tongue to the plaintiffs of goods of the said Edward Tongue, with power to the plaintiffs to sell the said goods towards satisfaction of the moneys to become due on the said note, in case of default in payment thereof; that the defendant made the said note as aforesaid

as surety for the said Edward Tongue to the plaintiffs, and not otherwise, whereof the plaintiffs had notice before and when they first received the said note from the defendant, and they took and always held it with such notice, and upon the terms that the defendant should be liable to them thereon as such surety only; and that, after the said default, the plaintiffs took possession of the said goods under and in pursuance of the said bill of sale; and that, although they could and might and ought to have sold the same before this suit, and with and out of the proceeds arising from such sale, have fully satisfied and discharged the whole of the moneys due on the said note, and now sued for, yet by and through the mere negligence, wilful default, and improper conduct of the plaintiffs in that behalf, the security of the said goods became and was wholly lost to the defendant, and insufficient to discharge the moneys now sued for. Issue thereon.

The cause was tried before Crowder, J., at the *sittings in London after last Trinity Term. The facts were as follows:— [*450 In April, 1857, one Edward Tongue applied to the plaintiffs for a loan, which the plaintiffs consented to grant him upon the security of a bill of sale of certain household furniture, and the joint and several promissory note of the applicant and a surety. The defendant was offered as surety, and was accepted. The money was advanced, a bill of sale of Tongue's furniture being duly executed, and a promissory note given to the plaintiffs in the following form:—

“£91 0 0.

“London, 28th April, 1857.

“We jointly and severally promise to pay the Mutual Loan Fund Association, or order, the sum of 91*l.*, for value received, by instalments in manner following, that is to say, the sum of 11*l.* 7*s.* 6*d.* on the 28th day of July next, and 11*l.* 7*s.* 6*d.* on the 28th day in every succeeding third month until the whole of the said 91*l.* shall be fully paid; and, in case default is made in payment of any one of the said instalments, the whole of the said 91*l.* remaining unpaid shall become due and payable.

“EDWARD TONGUE.

“N. C. SUDLOW.”

Two instalments were duly paid; but, default being made in payment of the third, the plaintiffs took possession of Tongue's furniture under the bill of sale, and sold it, and, after giving credit for the 22*l.* 15*s.* paid and 37*l.* 9*s.*, the net proceeds of the sale, brought this action to recover 30*l.* 16*s.*, the balance of the promissory note.

Evidence was given on the part of the defendant, that the goods of Tongue, but for the misconduct of the persons employed by the plaintiffs to sell them, would have produced enough to satisfy the entire balance due upon the promissory note.

The learned judge left the evidence to the jury; and *they [*451 returned a verdict for the defendant upon the fourth plea.

Atherton, Q. C., now moved for a new trial on the grounds of misdirection, and that the verdict was against the weight of evidence. Although the defendant was in one sense a surety for Tongue, it is clear, from the case of *Strong v. Foster*, 17 C. B. 201, that the question whether he was principal or surety must be ascertained by the terms of the instrument itself, without the aid of extraneous evidence. [BYLES, J.— That case has been strongly observed upon in Chancery. WILLIAMS,

J.—And in the Queen's Bench also.(a) The foundation of my opinion in *Strong v. Foster* was, that, assuming that the defendant was a surety, there was no evidence of time having been given by the bank to the principal debtor, so as to discharge the defendant: and I believe my Brother Crowder's opinion was given to the same effect. BYLES, J.—The chief justice held that the defendant was not a surety at all.] This might be an answer as to Tongue, but not as to Sudlow. [CROWDER, J.—That is an objection to the plea.] It certainly was not decided in *Strong v. Foster* that the character the party filled must be ascertained only by looking at the instrument: but such evidently was the inclination of opinion of some members of the court. [WILLIAMS, J.—The controversy is, whether the party is to be treated as a principal if he appears so upon the face of the instrument. In *Manly v. Boycot*, 2 E. & B. 46, the plea was held bad because it did not state that the plaintiffs accepted the defendant as surety; but it was not doubted that, if both parties had agreed that the note should be received from the defendant in the character of surety, the latter would *have had *452] all the rights of a surety, though upon the face of the note he did not appear to fill that character.] There is no doubt the defendant was accepted as surety: but it is submitted that the learned judge should have told the jury that, inasmuch as the defendant appeared to be a principal on the face of the note, and not a surety he must be treated as a principal.

COCKBURN, C. J.—I am of opinion that there ought to be no rule in this case. As to the verdict being against the weight of evidence, the learned judge who tried the cause informs us that he is not dissatisfied with the verdict. There was evidence on both sides; and therefore we see no reason for quarrelling with the conclusion the jury came to. Then, as to the alleged misdirection,—as it appears from the evidence, and indeed was admitted, that it was known to all the parties at the time the promissory note was given, that the defendant signed it as surety for the person to whom the advance was made, and it was found by the jury that the plaintiffs did in point of fact wastefully apply the proceeds of the effects of the principal debtor which had been conveyed to them for the purpose of securing the debt, I see nothing to prevent the now defendant, the surety, for setting that up as an answer to this action.

WILLIAMS, J.—I am of the same opinion. Two points might have arisen in this case, upon which it is now unnecessary to pronounce any opinion. One is, whether, if it appeared that the defendant was in fact a surety, though the lender did not know it, this sort of defence would be available: the other,—and it is one which is by no means concluded by the authorities,—is, whether, if it were known to the lender at the *time that the defendant was a surety, he would be precluded *453] from setting up the rights of a surety, merely by reason of the fact of his being such not appearing upon the face of the instrument itself. In the present case, however, it is clear that it was known to the lenders at the time the advance was made that the defendant signed the note as surety for Tongue. His suretyship was one of the conditions

(a) See *Pooley v. Harradine*, 7 Ellis & B. 431 (E. C. L. R. vol. 90), [affirmed in the Court of Exchequer Chamber, in *Greenough v. M'Lelland*, 2 Law Times Rep. N. S. 571]; *Fraser v. Jordan*, 8 Ellis & B. 303 (E. C. L. R. vol. 92).

upon which the money was advanced to the borrower. The defendant, therefore, is not precluded from availing himself of his rights as surety.

BYLES, J.—I also think the direction of the learned judge and the conclusion of the jury upon that direction were both right. As between the makers and the payees of the note, at law both the makers are principals, and evidence would not be admissible to show that one of them signed the instrument as surety. But, in equity, if it be made to appear that the lender was cognisant of the circumstances, you may show what the fact is. They become joint principals, or principal and surety, according to the facts.

CROWDER, J., said nothing.

Rule refused.

Whatever may have been the rule at common law, it is now settled in England that it may be shown by way of equitable defence to an action against one of two joint and several makers of a promissory note, that the defendant was, in fact, only surety for the other debtor, and known by the creditor to be such, and that time had been given to the principal, or that the conduct of the creditor had been otherwise such as in equity to discharge the surety: *Pooley v. Harradine*, 7 Ell. & Bl. 431; *Greenough v. McLelland*, 2 Law Times Rep. N. S. 571, in the Excheq. Chamber. It is not material in such a case, that the surety should appear to be such on

the face of the instrument, nor that there should have been any express stipulation at the time of its execution, that he was to be treated as surety only: *Greenough v. McLelland*, *ut supra*.

The decisions on this subject in the United States, among which there has been some diversity of opinion—though the weight of authority, even at law, is in accordance with the later English doctrine as above stated—will be found collected and very ably discussed in the American note to *Rees v. Berrington*, 3 Leading Cases in Equity, 3d Ed. 570, 573, &c.; and to 2 Am. Lead. Cas., 4th ed. 389, &c.

*BENJAMIN JOSH v. ISAAC JOSH. Nov. 2. [*454

Testator devised to a younger son, as follows,—“All that my messuage or dwelling-house and premises, with the piece of land thereto adjoining in T. St. L., with their respective appurtenances.”

Upon a special case, it was stated, that, when the testator first became possessed of the property (40 years ago), there was no fence to part the garden (No. 566 on the plan) from the land, and the parts numbered 567 and 568 formed one field, which was then called “The Five Acres;” that, about 30 years ago, he planted across it a fence, and after that called 567 “The Pear-Tree Piece,” and 568 “The Second Grass Piece;” that the other pieces were in like manner separated by fences, but there was a communication with all of them by means of gates: that the turnpike-road which separated 573 and 574 was made by the trustees under an act of parliament sometime after the testator had become possessed of the property, the land being purchased by them of the testator for that purpose; and that the testator used to call the different pieces “grounds:”—

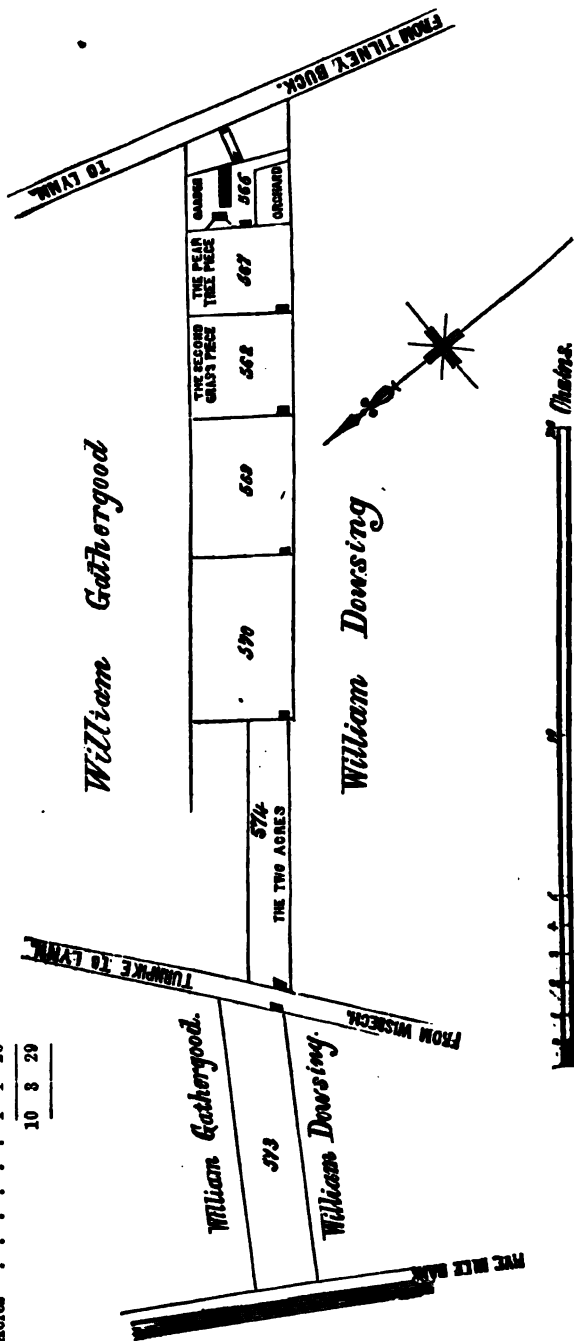
Held, that the devise was not confined to “The Pear-Tree Piece,” but included the other contiguous closes up to the turnpike-road.

Quere, whether it did not also include the piece beyond the turnpike-road.

THIS was an action of ejectment for the recovery of land in the parish of Tilney St. Lawrence, in the county of Norfolk, commenced by writ issued on the 20th of February, 1857; to which the defendant appeared and defended for the whole of the land therein mentioned. The cause

**PLAN OF AN ESTATE,
in the Parish of Tilney St. Lawrence,
THE PROPERTY OF THE LATE
ISAAC JOSH.**

	a.	r.	p.
566 House, garden, and buildings	0	2	37
567 The Pear-Tree Piece	1	0	20
568 The Second Grass Piece	1	1	11
569 Pasture	1	3	7
570 Arable	2	0	26
573 Arable	2	1	16
574 The Two Acres	1	1	26
	10	8	29



came on to be tried before Lord Campbell, C. J., at the last Summer Assizes in and for the county of Norfolk, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case :—

The plaintiff is a person described by the words “my son Benjamin Josh” in the will of Isaac Josh hereinafter set out; and the defendant is the eldest son and heir-at-law of the said Isaac Josh. The said Isaac Josh died on the 14th of October, 1856, having previously made his will in writing, bearing date the 23d of July, 1856, and attested as required by law in that behalf. The said will and attestation are respectively in the following words :—

“I, Isaac Josh, of Tilney St. Lawrence, in the county of Norfolk, farmer, do hereby revoke all wills and testamentary dispositions made by me at any time heretofore, and do publish and declare this to be my last will and testament. I give and devise *all that my messuage or dwelling-house and premises, with the piece of land thereto adjoining, in Tilney St. Lawrence aforesaid, with their respective appurtenances*, unto my son Benjamin Josh, his heirs and assigns for [456 ever: And I give and bequeath all my personal estate and effects of every kind unto my son Benjamin Josh, his executors, administrators, and assigns, absolutely: And, lastly, I nominate and appoint my said son Benjamin Josh and Henry Briggs of Clenchwharton, in the said county, farmer, executors of this my will. In witness whereof I the said Isaac Josh, the testator, have hereunto subscribed my name this 22d of July, 1856.

“The mark of

X

“ISAAC JOSH.

“Signed, published, and declared by the said Isaac Josh, the testator, as and for his last will and testament, in the presence of us, who in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

“W. EGGETT,

“W. B. RACKHAM, jun.

} Clerks to Mr. Pitcher, solicitor, Lynn.”

At the times of the making of the said will and at the death of the said testator, he was seised in fee of a messuage or dwelling-house and land in the parish of Tilney St. Lawrence, in the said county, and delineated in the map or plan hereunto annexed and to be taken as part of the case, the said land being coloured green, and which map or plan is a copy of that part of the map or plan of the said parish of Tilney St. Lawrence made under the provisions of the Tithe Commutation Act (6 & 7 W. 4, c. 71) which relates to the said land,—the figures 566, 567, 568, 569, 570, 574, 573, being thereon affixed for the purpose of referring thereto in the instrument of apportionment made under the said act.

The testator became possessed of the said land upwards of forty years ago, and continued to occupy it *from that time until his death. [457 When he first became possessed of the land, there was no fence to part the garden (566) from the rest of the land; and the parts numbered 567 and 568 formed one field, which was then called “The Five Acres.” Nearly thirty years ago, the testator planted a row of plum-trees across “The Five Acres” as a fence; and, after that, 567

was called by the testator and by other persons, "The Pear-Tree Piece," and 568 "The Second Grass Piece." The parts numbered 569 and 570 were formerly in one, and are arable land; and, between 568 and 569, there was formerly a ditch between eight and nine feet wide, and going all across, except where the gateway was. This ditch was filled up many years before the testator's death, and a substantial quick-fence was planted in its place, which has continued until the present time. The part numbered 574 went by the name of "The Two Acres," and was so called by the testator; and it was during all the time of the testator's occupation separated from 570 by a substantial quick-fence. The turnpike-road from Wisbech to Lynn, marked on the map, was made by the trustees under an act of parliament (4 G. 4, c. lv.) some time after the testator had become possessed of the property; the land being purchased by them of the testator for that purpose. Before that time, there was a little fence or grip, and a few stumps of bushes, and five or six old willow-trees between 574 and 573. The testator used to call the different pieces "grounds." During all the time the testator was possessed of the land, there was a roadway all along the south side, from 567 to the turnpike-road; and, for some time before and at the testator's death, there were gates between the different fields. The testator had no other land.

By the writ, which was annexed to, and to be taken as part of the *458] case, the land claimed was described as "all *that piece or parcel of land (portions of which were numbered respectively for the purposes of the Tithe Commutation Act for the parish of Tilney St. Lawrence, in the county of Norfolk, 568, 569, 570, 573, and 574), and which said piece or parcel of land adjoins and was used and occupied with a messuage and appurtenances by the late Isaac Josh, deceased, and situated," &c.

The plaintiff is in possession of the field next to the dwelling-house and garden numbered 567; and he claims under the said will the remainder of the said land between the house and the said road, he having at the trial abandoned the claim to 573.

The defendant is in possession of the land so claimed, and claims as heir-at-law to retain the same against the plaintiff, on the ground that it was not disposed of by the said will, and so descended to him.

The question for the opinion of the court was, whether the plaintiff was entitled to recover all or any part of the land claimed in the writ. If the court should be of opinion in the affirmative, the verdict was to be entered for the plaintiff as to so much of the said land as the court should think he was entitled to recover, and for the defendant as to the residue: and, if the court should be of opinion in the negative, the verdict was to be entered for the defendant.

David Keane, for the plaintiff.—The description is sufficient to include the whole of the property, even the piece of land numbered 573 which was abandoned at the trial. The court is to construe the will so as to carry out the intention of the testator as expressed therein. Now, it clearly was not the intention of this testator to die intestate as to any part of the property which he possessed in Tylney St. Lawrence. If so, all up to and including No. 574 passed by the will. [WILLIAMS, J. *459] —The fact of your having given up No. *573 removes your argument as to the testator's not intending to die intestate as to any part of his property.] It is as if we started by claiming less than

the whole. [WILLIAMS, J.—Your argument must be the same as if you claimed the whole.] No. 573 is only separated from the rest by a mere easement to the public. The *whole* unquestionably would have passed by this devise, if the words “with the piece of land thereto adjoining” had been omitted. Could the testator have intended to give 568, 569, and 570, and yet to shut out the plaintiff from all access to the direct road from Wisbech to Lynn? [WILLIAMS, J.—The difficulty in your way, is, that, taking the natural meaning of the words, there is one (No. 567) which exactly answers the description.] The whole, it is submitted, answers the description. [BYLES, J.—The expression is “piece of land,” in the singular.] If the testator had intended to give the plaintiff “The Pear-Tree Piece” only, he would naturally have called it by that name. The circumstance of there being a communication all through by means of gates naturally suggested unity to the mind of the testator. A farm might well be described as a “piece of land.” [COCKBURN, C. J.—The testator seems to have always treated the land as consisting of several pieces. When, therefore, he speaks of the “piece of land adjoining his dwelling-house and premises,” how can we say that he means to include the whole? If he had so intended, he would naturally have used a more general expression.] In *Ricketts v. Turquand*, 1 House of Lords Cases 472, a testator, who described himself as of “Ashford Hall, in the county of Salop,” devised “all my estate in Shropshire called Ashford Hall,” to trustees, for sale; and it was held that this description was not confined to the mansion-house so called, and the lands immediately adjoining, but extended to such [*460 other lands in Shropshire as the testator possessed at the time of making his will. [COCKBURN, C. J.—There, the lands were all known as “The Ashford Hall estate.”] This is not like the case of *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227 (E. C. L. R. vol. 69); for, here, the internal communication is kept up by means of the gates. In *Doe d. Renow v. Ashley*, 10 Q. B. 663 (E. C. L. R. vol. 59), in 1814, premises were purchased by the testator, which in the conveyance to him were described as containing by estimation 3 acres, 5 perches, and were of that quantity, or nearly so. They then consisted of a field, an orchard, and a house and garden, and so remained until 1838, when the house and garden and south part of the field were let. The testator then made a fence, which prevented all communication between the north and south parts of the field; and the tenant afterwards subdivided the south field into two. The premises continued in this condition until the testator's death; he occupying the north field and orchard, and the tenant holding the residue. The north field was at the north corner of the town of M., and opposite a pond. In 1840, the testator devised “all that my messuage or dwelling-house, with the out-buildings, garden, orchard, and appurtenances thereto belonging,” occupied by A. B., “situate on the east side of the town of M.,” “and a close of land adjoining, being the close at the north corner of the town of M., and opposite the pond, and containing, with the garden and orchard, 3 acres, 5 perches, more or less,” to his daughter in fee. By a codicil, in 1841, after reciting that he had given to his daughter “a close situate at M., being the close at the north corner of the town of M.,” “and opposite the pond, and containing,” &c. (as in the will), “and now in my occupation,” he proceeded,—“Now, I do hereby revoke,” &c., the devise “of the said close

*461] to my said daughter;" and devised * "the same close, with the appurtenances," to another daughter: and, upon a question whether the two south fields passed by the codicil,—it was held, that the description by the testator's occupation was clear, that the description by quantity was uncertain, and that the north field only so passed. In *Goodtitle d. Radford v. Southern*, 1 Man. & Selw. 299, the devise was of "all that my farm called Trogue's Farm, now in the occupation of A. C.," and it was held that this was not necessarily limited to the lands of Trogue's Farm in the occupation of A. C., but might be shown by evidence to extend to other lands of Trogue's Farm not in his occupation. In *Doe d. Hemming v. Willetts*, 7 C. B. 709 (E. C. L. R. vol. 62), a testator, having four sons, A., B., C., and D., devised to his sons B., C., and D., "all those my five freehold messuages, tenements, dwelling-houses, and premises, with their appurtenances, at R., in the occupation of J. P. or his under-tenants, to hold to them, their heirs and assigns, for ever, as tenants in common." The property in the occupation of J. P. at the time of the making of the will, and of the testator's death, consisted of five cottages and about three acres of meadow-land adjoining: and it was held that the land passed to B., C., and D., as well as the cottages. In the course of the argument *Wilde, C. J.*, says,—"Suppose you strike out the words 'five freehold messuages and tenements,' leaving it,—'all those my premises, with their appurtenances, at Rowley Regis, in the occupation of James Priest,'—would not that pass the land, which was in the occupation of Priest? Is the effect of the word 'premises' circumscribed by the previous words?" So, here, strike out the words, "with the piece of land thereto adjoining," and the words would amply suffice to pass the whole of this property.

*462] *Couch*, for the defendant.—The heir-at-law is not to *be disinherited, except by express words. These several pieces of land were always treated and dealt with by the testator as separate: and in the award of the commissioner under the Tithe Commutation Act, a separate rent-charge is put upon each. [*COCKBURN, C. J.*—Was that before the date of the will?] In all probability it was. The date of the award does not appear: but the will bears date in 1856. In 1 *Jarman on Wills*, 2d edit. 676, it is said: "It is a well settled canon of construction, that, where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject." *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453 (E. C. L. R. vol. 23), very closely resembles this case. There, the devise was, of "all my messuages situate at, in, or near a street called Snig Hill, in Sheffield, which I lately purchased of the Duke of Norfolk's trustees. The testator had four houses in Sheffield, about twenty yards from Snig Hill, and two houses about four hundred yards from it, in a place called Gibraltar Street, also in the town of Sheffield. He purchased all the houses by one conveyance, and redeemed the land-tax upon all by one contract. He had no other houses in Sheffield. It was held, that the terms "at, in, or near Snig Hill" did not apply to the houses in Gibraltar Street; and that, there being four houses which answered all the

terms of the devise, it must be understood as meant to pass those, and not the two to which only part of the description applied. Parke, J., there says: "One rule of construction is, that an heir-at-law shall not be disinherited except by express words. And another, as stated by Lord Bacon, is, that, if there be *some land wherein all the [*463 demonstrations in a grant are true, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation, to pass only those lands wherein all the circumstances are true. Here, all the circumstances are true of the four houses, but not so of the two: these last are not 'at, in, or near Snig's Hill,' and they are in a place bearing a different name. And, if the testator had intended by the devise in question to pass all these houses, why should he not have described them as all his houses in Sheffield (for he had no others)? or, all the houses which he bought of the duke's trustees?" [WILLES, J.—All these cases are explained in *Morrell v. Fisher*, 4 Exch. 591.† You cannot reject part, where there is something which answers the *whole* description. *Doe d. Ashforth v. Bower* falls under the rule that *falsa demonstratio non nocet*.] Here "piece of land adjoining" are the only words that the land can pass under: reject them, and there is nothing to show an intention to pass anything. As to the word "appurtenances," lands usually occupied with a house, will not pass under a devise of "a messuage, with the appurtenances," unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense: *Buck d. Whalley v. Nurton*, 1 B. & P. 53. "Lands," says Eyre, C. J., "will not pass under the word 'appurtenances' taken in its strict technical sense: they will pass if it appears that a larger sense was intended to be given to it. If the court had always adhered to this line of construction, many reported cases would not now disgrace the books. Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in *Hobart* 33, there be demonstration plain of an intent to use them in a different sense." There is nothing in the fact that there was a communication by *means of gates between [*464 them, to show that the testator meant to describe all these several fields as a piece of land. In *Doe d. Parkin v. Parkin*, 5 Taunt. 321 (E. C. L. R. vol. 1), the devise was of "all my messuages in T., and now in my occupation:" the testator had two messuages in T., of which he occupied only one; and it was held that only that one passed by the devise. In *Doe d. Ryall v. Bell*, 8 T. R. 579, it was held, that, by a devise of "all my copyhold estate situate in A., and which I became entitled to on the decease of my father," copyhold estates did not pass which the devisor's father had surrendered to him in his lifetime, though the father retained possession of them to the time of his death, which happened prior to the will made by the son; there being other copyhold of the son answering the description in the will. Words may, no doubt, be rejected, where their retention renders it impracticable to put any sensible construction upon the devise as it stands. Here, however, there is no such difficulty. In *Doe d. Renow v. Ashley*, 10 Q. B. 668 (E. C. L. R. vol. 59), Lord Denman, in giving judgment, says: "It is suggested that the three closes were considered by the testator as one; but there is no evidence to sustain that suggestion: and the fact that the testator substituted for the more temporary separation by posts and

rails a permanent separation by a live hedge, leads to a contrary conclusion." So, here, the suggestion that the whole of these closes may be treated as one piece of land, is conclusively rebutted by the facts stated in the case, that thirty years ago the testator planted a fence across the "Five Acres," and afterwards called the two parts by different names. The decision in *Doe d. Hemming v. Willetts*, 7 C. B. 709 (E. C. L. R. vol. 62), did not turn upon the word "premises" only.

Keane, in reply, referred to *Ongley v. Chambers*, 1 Bing. 483 (E. C. L. R. vol. 8), 8 J. B. Moore 665 (E. C. L. R. vol. 17), where under a *465 devise of "the rectory or parsonage of M., with the messuages, lands, &c., thereunto belonging," it was held that lands passed which had been acquired by the owners of the rectory between the 5th year of James I., and 1632, and had always afterwards been occupied with the rectory. [COCKBURN, C. J.—There is a marked distinction between the expressions "thereunto belonging" and "thereunto adjoining."] "Lying to," "usually occupied with," and "adjoining" are all synonymous.

The Court suggested the propriety of the parties agreeing to a compromise. But this was not assented to. *Cur. adv. vult.*

COCKBURN, C. J., now delivered the judgment of the court.^(a)

The testator devises to a younger son, the plaintiff, "all his messuage or dwelling-house and premises, with the piece of land thereto adjoining, in Tilney St. Lawrence, with their respective appurtenances."

Three constructions are possible,—first, that the devise includes, besides the dwelling-house, garden, and orchard, the "Pear-Tree Piece" next adjoining, and no more. This is the construction contended for by the defendant, the heir-at-law. Secondly, that it comprehends, in addition to all these, the other contiguous closes of the testator up to the turnpike-road, the soil of which road had before the will been sold by the testator. This is the construction now contended for by the plaintiff, the devisee. Thirdly, that it further includes the small close, No. 573, lying on the other side of the turnpike-road. This is the construction *466 originally contended for by the plaintiff, the devisee, but abandoned by him at the trial.

It is agreed by both parties, that, by the words "messuage or dwelling-house and premises, with their respective appurtenances," the house and curtilage pass, including therein the garden and orchard, but no more. Then comes the question now in controversy between them,—what is the meaning of the words "with the piece of land thereto adjoining?"

In construing these words, we are to apply them to the description and situation of the property at the date of the will, and, if possible, to give them, when so applied, their primary meaning.

The defendant says that the word "piece" primarily indicates a portion or fragment of some larger quantity; and, as the piece of land contiguous to the homestead had been fenced off by the testator, and was called by the testator and others "The Pear-Tree Piece," he contends that that, and that alone, fits the strict primary meaning of the word "piece."

But we think that the question is not so much what might have been meant by the word "piece," standing alone, as what is meant by the

(a) The case was argued before Cockburn, C. J., Williams, J., Willes, J., and Byles, J.

expression "piece of land" used in the will. The expressions "piece of land" or "bit of land" are so familiar as to be almost colloquial. In ordinary language, they mean, a small portion of land. Nor is the primary meaning of the word "piece" departed from, when the expression "piece of land" is thus understood; for, "piece of land," in this sense, still imports a portion of land, as separated or distinguished from other land, not indeed, of the same owner, but of other owners. It may be added, that this sense of the word "piece" itself seems at least as consistent with the testator's language as the other, if not more so; for, he does not say, "the piece of *my* land," but simply "the piece of land;" and *the words "thereto adjoining" are as consistent [*467 with this construction as with that contended for by the defendant; for, the whole of the land up to the turnpike-road is in the strictest sense adjoining, for it is all contiguous. Besides, had the testator intended "The Pear-Tree Piece" only, the more natural description would have been "the close," "the field," or "the ground," for it appears that he called the different fields "grounds."

As to the argument that the testator and others called the close nearest the homestead "The Pear-Tree Piece," the answer is, that it is not so described in the will; and the absence of so familiar and unambiguous a designation tends to show that the testator did not intend to confine his devise to that close alone.

For these reasons, we think that the plaintiff, the devisee, is entitled to recover at least all he seeks to recover in this action.

Judgment for the plaintiff.

***BROWN, Appellant, NICHOLSON, Respondent. Nov. 17. [*468**

A borough may be a "town corporate" within the licensing act, 9 G. 4, c. 61, s. 1, though it has no separate Court of Quarter Sessions.

A license was granted by the justices of the borough of M.,—a place having a separate commission of the peace, but no separate Court of Quarter Sessions,—at a licensing meeting held on the 7th of September, which had been duly appointed by them as they had always been accustomed to do:—Held, that the license so granted was valid, notwithstanding that the justices for the county (who had concurrent jurisdiction in M.) had *previously* appointed a license meeting for the 8th.

THIS was an appeal against a decision of two justices for the borough of Maidenhead, in the county of Surrey. The following case was stated for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43:—

On the 1st of February, 1858, Mr. William Nicholson, of the parish of Bray, in the said borough of Maidenhead, appeared before two justices of the peace for the said borough, to answer the information of Joseph Brown, of New Windsor, in the county of Berks, bailiff, For that he the said William Nicholson, of the parish of Bray, in the said borough, did, in a certain house and premises there situate, in his occupation, on Tuesday, the 19th of January, 1858, permit a certain quantity of exciseable liquors, to wit, a quarter of a quatern of gin, to be sold by retail to the said informant, to be drunk or consumed in the said house and premises of him the said William Nicholson, he the said William Nicholson not having then and there a license to sell exciseable liquors

by retail to be consumed on the said premises, authorizing him so to do, contrary to the form of the statute in such case made and provided.

On the hearing of the information, it was proved, that, on the 19th of January, 1858, the appellant, Joseph Brown, went to the house of the said William Nicholson, situate in the borough of Maidenhead, and, on asking for a small quantity of gin, he was served by the said William Nicholson with a quarter of a quatern, which he (Brown) drank on the premises of the said William Nicholson, and for which he paid Nicholson 2d. It was further stated by Brown that William Nicholson had no license to sell spirits.

*469] *William Nicholson then produced to the justices a license granted to him by the Excise (on the authority of three magistrates for the borough of Maidenhead, who had signed his license), for the sale of wines and spirits, which was not objected to as being other than what it purported to be; that is to say, a license granted by the Excise to the said William Nicholson for the sale of wines and spirits.

The complainant by his counsel contended that the license was bad, inasmuch as the justices who granted the license upon the authority of which the license to sell spirits was granted by the Excise Office, had no authority to grant such license, because, the borough of Maidenhead being one of the boroughs under the Municipal Corporation Act, 5 & 6 W. 4, c. 76, and having a separate commission of the peace, but no separate Court of Quarter Sessions, the borough justices had no power to grant alehouse-licenses, because the justices for the county of Berks acting for the Maidenhead division (in which division the borough of Maidenhead is situate), had, as was admitted to be the fact, appointed their annual licensing meeting by precept to the high constables before the justices for the borough of Maidenhead appointed theirs, and that therefore the borough justices had no power to appoint an annual licensing meeting, but that the application of Mr. Nicholson for a license should have been made to the county justices, and that the borough justices might have sat with the county justices, and have jointly acted on the granting of the license to Mr. Nicholson.

It was contended by Mr. Nicholson that the first objection was invalid, inasmuch as the borough of Maidenhead was not a new borough created by the 5 & 6 W. 4, c. 76, but was an ancient borough, acting *470] under *ancient Royal charters, and that the magistrates for the borough, before the passing of the said act, as well as since, had, as was admitted to be the fact, always granted the licenses for the sale of exciseable liquors in the borough, and had never acted conjointly with the justices for the county in granting such licenses.

It was also contended by Mr. Nicholson that the second objection was invalid; that he was by the 9 G. 4, c. 61, s. 10, compelled to give notices of his application for a license in the months of June or July, for three successive Sundays on the church door and the door of the house for which he intended to apply for a license, and that, in order to give this notice, he had to apply to the clerk of the justices of the borough of Maidenhead, to know the day on which it was proposed to hold the annual licensing meeting for the borough; that the 7th of September was, as was admitted to be the fact, fixed for such meeting; and that, for three Sundays in the month of July, Mr. Nicholson was obliged to give notice on the church door and on the door of the house,

stating that he would apply to the justices on the 7th of September; and that the county justices did not hold their annual licensing meeting till the 8th of September, as was admitted to be the fact, which was the day after that of the borough justices; and that, therefore, the application was properly made.

The justices decided that Mr. Nicholson had not sold spirits without a license; and ordered the informant to pay the costs, amounting to 7s. 9d.

The question for the opinion of the court was, whether, upon the facts stated, the said determination of the justices was correct.

Manisty (with whom was *Lawrence*), for the *appellant.(a)— [*471
The borough of Maidenhead was one of the boroughs existing at the time of the passing of the Municipal Corporation Act, 5 & 6 W. 4, c. 76. By the 1st section of that act, all grants and charters are repealed, and all boroughs are obliged to resort to the Crown to obtain a separate Court of Quarter Sessions. In many instances the Crown granted separate commissions of the peace, and not separate Quarter Sessions. Maidenhead has a separate commission of the peace, but no separate Court of Quarter Sessions. There are two sets of justices,—the county (Berks) justices, and others having a more limited jurisdiction. The borough justices have no power to grant spirit licenses; and, at all events, the justices acting for the division of the county in which Maidenhead is situate having appointed their annual licensing meeting for the 8th of September, it was not competent to the borough justices afterwards to appoint a licensing-day for the 7th. It is difficult to distinguish this from the case of *The King v. Sainsbury*, 4 T. R. 451, which has been acted on down to the present time. It was there held, that, where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale-licenses, their jurisdiction attaches so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day: but if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licenses, their proceeding is illegal, and the subject of an indictment. In giving judgment, Lord Kenyon says: "That the King may grant a commission of the peace for a county, and that the jurisdiction of such justices may pervade the whole county, cannot be doubted. Neither can it be disputed that he may grant *commissions of the peace for any particular district in the county, and that that subdivi- [*472
sion may have justices of its own, exclusive of the jurisdiction of the justices of the county at large: but the latter can only be effected by a non-intromittent clause, prohibiting the county justices from interfering in that district. This doctrine was fully recognised in *Talbot v. Hubble*, 2 Stra. 1154, from a manuscript note of which it appears that it was there taken as a datum that the justices of the county would be excluded if there were a non-intromittent clause in the charter granted to the smaller district, but not otherwise. In one of the charters granted to the city of London, there is an express power of constituting the mayor and certain of the aldermen justices of the borough of Southwark; they are therefore charter justices of that district; and that jurisdiction has never, I believe, been doubted. But another question has arisen, and which is proper should be settled, whether it be legal (for, whether it be

(a) The case was argued in last Trinity Vacation, before Crowder, J., and Willes, J.

decent or decorous, no person can doubt, for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these:—Some of the justices for the county of Surrey, having before them the statute 26 G. 2, c. 31, and knowing that the licenses ought to be granted on a certain day and time, appointed a day, the 4th of September, for licensing ale-houses in this division; on which day they accordingly held their meeting: and certain of the magistrates of the city of London, who in general are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting, had attached before *473] that time; not *indeed, so as to exclude the city justices from acting at the first meeting, for, they might all have acted together; but it excluded the city justices of their jurisdiction to act on the subsequent day. On the general question, therefore, I am clearly of opinion that the Surrey justices and the magistrates for the city have a co-ordinate jurisdiction within this district; and that the meeting of the city justices in this case was illegal, the jurisdiction of the other magistrates having first attached." [CROWDER, J.—Can Mr. Nicholson be liable to a penalty when he has a license granted to him by persons professing to have authority to grant it?] The license being illegal, it cannot afford any protection against penalties: *The King v. Downes*, 3 T. R. 560. [WILLES, J.—Do you admit that the borough justices would have had power to appoint a licensing-day and to grant licenses, if the county justices had done nothing?] The better opinion seems to be that the borough justices have nothing whatever to do with the granting of licenses. The 1st section of the licensing act, 9 G. 4, c. 61, enacts, "that, in every division of every county and riding, and of every division of the county of Lincoln, and in every hundred of every county, not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, town, city, and *town corporate*, in that part of the united kingdom called England, there shall be annually holden a special session of the justices of the peace (to be called the general annual licensing meeting), for the purpose of granting licenses to persons keeping or being about to keep inns, ale-houses, and victualling-houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises therein specified; and that such meetings shall be holden in the counties of Middlesex and Surrey within the first ten days of the month of March, and in every other county on *474] some day between *the 20th of August and the 14th of September, inclusive; and that it shall be lawful for the justices acting in and for such county or *place* assembled at such meeting, or at any adjournment thereof, and not (as thereafter) disqualified from acting, to grant licenses for the purpose aforesaid to such persons as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper." At the time of the passing of that act, all towns corporate had separate Courts of Quarter Sessions, and therefore none others could have been contemplated; consequently the authority to grant licenses so given by that act to the justices acting in and for such *place*, must be limited to

justices acting in and for places having a separate Court of Quarter Sessions. The 26th section enacts "that it shall be lawful for any justice before whom any penalty shall be recovered under the provisions of this act, to award, if he shall think fit, any portion of the same, not in any case exceeding one moiety thereof, to the use of the prosecutor, and the remainder to the treasurer of the county or *place* for which such justice shall then act; and the said treasurer shall place the same to the credit of such county or place, and shall duly account for the same." In *The Queen v. Dale, Dears. & P. C. C. 37, 22 Law J., M. C. 44*, the defendant, the clerk to the justices of Tynemouth, was indicted for a misdemeanor in having contemptuously and unlawfully neglected and refused to pay over to the treasurer of the county of Northumberland one moiety of a fine imposed under the above act by certain justices of the borough of Tynemouth,—a place which had a commission of the peace, but no grant of separate Quarter Sessions within the 5 & 6 W. 4, c. 76, and was found guilty: and, upon a case reserved, it was held that he was properly convicted, as penalties under that act imposed by the justices *of a borough so circumstanced, are payable to the [475 treasurer of the county, and not to the treasurer of the borough.

Assuming that the two sets of justices have concurrent jurisdiction within the borough of Maidenhead, they clearly cannot exercise the same jurisdiction in the same place at different times. Could it be legal, as Lord Kenyon asks in *The King v. Sainsbury*, for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? This is a statutory power, which, once exercised, is done with: and the statute requires it to be exercised at a particular time. Ashhurst, J., in *The King v. Sainsbury*, says: "There being no words of exclusion in the city charters, it follows as a consequence that the justices of the county have a concurrent jurisdiction in the borough of Southwark: if so, it also follows that the jurisdiction of holding the meeting directed by the 26 G. 2 attached in those magistrates who first gave notice of the meeting; and it was a breach of the law in the other magistrates to attempt to wrest the jurisdiction out of their hands." [WILLES, J.—All that amounts to is, that it is an indecorous and improper thing, and probably indictable. Nevertheless, I apprehend, the conviction would be held good.] It is submitted that the borough justices had no power to appoint a licensing meeting at all, and that the meeting on the 7th, after the day had been duly appointed by the county justices, who alone had power to appoint a day, was not a legal meeting.

Griffiths, contra.—Assuming that the borough justices had not the jurisdiction which they professed to have, the respondent, who could have no means of knowing whether or not the justices exceeded their jurisdiction, ought not to be made amenable. The point was not *argued in *The King v. Downes*, 3 T. R. 560. In *The King v. Bryan*, Andrews 81, Page, J., says: "If a license is granted improperly, as, by justices living out of the division, it is not void as to the person acting under it, who probably does not know the exact bounds of the division." And Probyn, J., says, that, "if this point was now in question, it would deserve consideration whether the justices can punish a man by this statute, who acts under a visible authority." That case was not referred to in *The King v. Downes*. [WILLIAMS, J.—There was no positive decision in *The King v. Bryan*.] And in *The King v. Minshall*,

1 N. & M. 277 (E. C. L. R. vol. 28), the court inclined to think that a license to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the license is granted; but that, at all events, the party could not be fined for having acted *bonâ fide* under it. This is not the fit tribunal to try a question of this sort. If a license is granted which is apparently good upon the face of it, the party ought to be protected by it until set aside by appeal, or by certiorari. But it is submitted that the Maidenhead justices were the proper persons to grant this license. The *King v. Sainsbury*, 4 T. R. 451, is very different from the present case. There, a set of justices having jurisdiction in Southwark, duly held a meeting for the purpose of licensing, and rejected Hedger's application for a license: and another set of justices, having concurrent jurisdiction in the same place, afterwards appointed a licensing meeting, and granted Hedger a license: and for this the last-mentioned justices were indicted, and convicted. This borough has by tacit understanding been treated as a sessional borough for all purposes. There is no statement here that there has been any division of the county *477] under the 9 G. 4, c. 43, s. 1: but it may be *assumed that Maidenhead has been treated as a division for the purpose of licensing; and if so, a special session might be appointed for the purpose of licensing. The circumstance of the Municipal Corporation Act having taken away the Quarter Sessions, cannot affect the right of the justices to hold a special session for this purpose. An appeal against the refusal of a license would go, even if the borough had a separate Court of Quarter Sessions, to the Quarter Sessions of the county: *The Queen v. Cockburn*, 4 Ellis & B. 265 (E. C. L. R. vol. 82), 24 Law J., M. C. 43. The right of the borough justices to act in matters arising within the borough is recognised by several statutes: see 12 & 13 Vict. c. 64; 13 & 14 Vict. c. 91, s. 9. None can be so competent to grant licenses as those living in the place, and having a local knowledge. *The Queen v. Dale, Dears. & P. C. C. 37*, does not affect this case. The only question there was, to whom the penalty was to be paid. If there was no treasurer for the borough, it may be that it was properly payable to the county treasurer. The Quarter Sessions will take judicial notice of the petty-sessional divisions of a county: *The Queen v. Whittles*, 13 Q. B. 248 (E. C. L. R. vol. 66). All licenses in Maidenhead have hitherto been granted by a special session for the borough: and the same course has been pursued in all other boroughs similarly circumstanced throughout the country. This jurisdiction of the county justices is now for the first time set up.

Manisty, in reply.—If there had been any pretence for the sessional division suggested, this question never could have arisen. [CROWDER, J.—Why do the county justices now for the first time assume this jurisdiction?] The difficulty has arisen from the case of *The Queen v. Dale*. [WILLES, J.—The proper mode of raising so important a question would have been by an indictment or by *quo warranto*.]

Cur. adv. vult.

*478] *CROWDER, J., now delivered the judgment of the court: (a)—This was a case stated for the opinion of the court, by way of appeal from the decision of two of the justices for the borough of Maidenhead, refusing to convict the respondent upon the information of the appellant.

(a) The case was argued before Crowder, J., and Willes, J., only.

The information was laid by the appellant against the respondent for selling exciseable liquors by retail, without being licensed pursuant to the statute 9 G. 4, c. 61.

It appeared on the hearing that the respondent sold the liquor at his house in the borough of Maidenhead. He was licensed by the Excise and by the justices of the *borough*. It was contended that the license was void,—first, because the borough of Maidenhead has not a separate commission of the peace, and that only in boroughs having a separate commission of the peace can the justices grant licenses,—and, secondly, because the justices for the division of the county in which Maidenhead is situated had appointed their annual licensing meeting for the 8th of September, before the borough justices had appointed theirs for the 7th of September, on which day the license in question was granted by them. With respect to the first objection, it is one which we ought not to sanction, without some strong ground either of authority or argument upon the construction of the statute. The borough of Maidenhead is an ancient borough, and both before and since the Municipal Corporation Act the licenses for the borough have always been granted in the same manner as in the present case. The argument for the appellant was chiefly rested upon the case of *The Queen v. Dale, Dears. & P.* [*479 *C. C. 37, which was said to have decided that a town though corporate, and so a “town corporate” within the words of the act, was not within its true construction, unless it had a separate court of quarter sessions. The case, however, upon consideration, does not appear to us to bear that construction. The decision amounts simply to this, that “the place” to the treasurer of which the penalties under the 26th section of the licensing act are to be paid, is the place out of the rate upon which the costs of public prosecutions are to be defrayed. It is quite consistent with this that the borough justices should grant licenses for the borough, where they have jurisdiction, though the penalties imposed by them under the act should go in aid of the county-rate. In the course of the argument, indeed, Coleridge, J., is reported to have said that “town corporate” means a city or town having *exclusive* jurisdiction; but that is not relied upon in the judgment; and we have been unable to find any authority for so limiting the expression “town corporate.”

Even since the Municipal Corporation Act, where a borough has a separate quarter session, the appeal is not to the recorder but to the quarter sessions of the county: *The Queen v. Cockburn*, 4 Ellis & B. 265 (E. C. L. R. vol. 82).

The arguments for the appellant have failed to satisfy us that the long-established practice consistent with the language of the act of parliament, and which is in itself evidence of what was meant and understood by the act at the time it was passed, ought to be set aside by us in a case where there can be no appeal from our decision.

As to the second objection, it was attempted to be sustained in argument by reference to *The King v. Sainsbury*, 4 T. R. 451, where the justices of London, having jurisdiction in Southwark, appointed a day for granting licenses for that place, after that on which the [*480 *justices of Surrey, who had concurrent jurisdiction there, had previously appointed their meeting for the same purpose. In that case, a license granted by the former justices after it had been refused by

the latter, was held void, and the meeting of the former was held to be without jurisdiction, because otherwise there would have been two conflicting jurisdictions, instead of the one intended by the law. In this case, no such consequence would follow, because the notices required by the act, and which were not required by the 26 G. 2, c. 31, the act in force when *Rex v. Sainsbury* was decided, were given for the meeting appointed by the borough justices, and not for that appointed by the county justices. The matter to be adjudicated upon by each set of justices was not the same. Moreover, if the borough justices have jurisdiction, it is difficult to point out how they could otherwise have exercised it, and the course pursued was the usual and accustomed one, and no real interference with the county justices is suggested, nor did any exist in fact.

We may add, that it was peculiarly harsh to raise this question by a proceeding for a penalty against a private individual, instead of by *quo warranto* against the justices. The appeal is therefore dismissed with costs.

WILLIAMS, J.—I heard a portion of the argument in this case, but not enough to make it right for me to take any part in the judgment.

Appeal dismissed, with costs.

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*BURNS *v.* CHAPMAN. *Nov. 9.*

It is no ground for rescinding an order for a *capias* under the 1 & 2 Vict. c. 110, s. 3, that the plaintiff, when he comes to declare, may have to rely upon a cause of action different from that stated in the affidavit upon which the order was obtained.

The court will only interfere where it clearly appears that the obtaining the order is an abuse of its process.

Quære, whether the 189th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), applies to a claim for wages earned on board an American ship?

A WRIT of summons issued against the defendant in this cause on the 8th of October, 1858; and on the same day the plaintiff obtained an order of Hill, J., for a *capias* under the 1 & 2 Vict. c. 110, s. 3, which order was obtained upon the following affidavit:—

"I, Robert Burns, of, &c., ship-steward, make oath and say,—1. That the above-named defendant, James Chapman, before and at the time of the commencement of this suit was, and still is, justly and truly indebted to me in the sum of 20*l.* 13*s.* 6*d.* for work and labour done and performed by me and my wife Caroline Burns on board the ship J. F. Chapman, for the defendant, at his request, as steward and stewardess thereof,—2. That the above-named defendant is an American, and is captain and part owner of the said ship J. F. Chapman, which said ship is now taking in ballast at the Commercial Dock, Rotherhithe, in the county of Surrey, and that the said ship is about to leave England for New Orleans, in America, and that the said defendant is going out in the said ship as captain thereof on Saturday morning, the 9th of October instant,—3. That, on Thursday, the 7th of October instant, I was informed by the mate of the said ship, and which information I believe to be true, that the said ship, with the above-named defendant as captain thereof, would leave England for New Orleans, in America, on Saturday, the 9th of October instant,—4. That for the reasons afore-

said, I verily believe that the above-named defendant intends to leave England for New Orleans, in America, and that I shall lose my said debt unless he be forthwith apprehended,—5. And that a writ of *summons in this action was issued out of this court, a true copy [*482 whereof is hereto annexed.”

On the evening of the same day the defendant was arrested on a capias issued by virtue of this order, whereupon he deposited with the sheriff the sum of 20*l.* 13*s.* 6*d.*, together with 10*l.* in lieu of a bail-bond, and afterwards paid the additional sum of 10*l.* into court.

On the 12th of October, a summons was taken out before the same learned judge, calling upon the plaintiff to show cause why the above order should not be rescinded. The affidavit of the defendant filed upon that occasion stated that the defendant was master and part owner of the ship *J. F. Chapman*, which sailed from New York, in the United States of America, on the 13th of July last, for Port Neuf, in the river St. Lawrence, Lower Canada, and thence to the port of London; that the ship sailed under the defendant's command, under articles prepared and entered into at New York, dated the 10th of July last, by which she was empowered to sail to Port Neuf, and thence to London, with the privilege of four other foreign ports should the master require it, and back to a port of discharge in the United States; that the plaintiff and his wife both shipped under the said articles on or about the 10th of July, the plaintiff as cook, and his wife as stewardess, and both signed the articles, the plaintiff for 25 dollars per month wages, and the wife for 10 dollars per month, and that the plaintiff at the time of shipping received 12 dollars and his wife 5 dollars advance, pursuant to the articles; that, by the said articles, it was amongst other things agreed, “that, in consideration of the monthly or other wages against each respective seaman or other mariner's name thereunder set, they severally should and would perform the above-mentioned voyage, and the said master did agree *and hire the said seamen or mariners for [*483 the said voyage at such monthly wages or prices to be paid pursuant to that agreement and the laws of the congress of the United States of America;” that the said articles further contained a provision by which, in case of desertion, wages were to cease, and also the following provisions—“And it is further agreed that no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at the last above-mentioned port of discharge, and her cargo delivered;” and “that each seaman or mariner who shall well and truly perform the above-mentioned voyage (provided always that there be no desertion, plunderage, embezzlement, or other unlawful acts committed on the said vessel, cargo, or stores) shall be entitled to the payment of the wages or hire that may become due to him pursuant to this agreement, as to their names is severally affixed and set forth; provided, nevertheless, that, if any of the said crew disobey the orders of the master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of such disobedience or absence shall be forfeited;” that the said vessel arrived in the Commercial Docks in London on the 27th of September; that, on the 2d of October, the plaintiff and his wife unlawfully deserted the ship without the defendant's sanction, and refused, although subsequently requested by him, to return to the ship, and

they had not since returned, whereby any wages due to them became by the laws of the United States for the government of seamen, merchants, &c., endorsed on and referred to in the said articles, forfeited by them respectively; that certain sums had been advanced to the plaintiff or paid for him at his request during the voyage; that the whole of the wages of the plaintiff and his wife combined up to the time of their *484] deserting the *ship as aforesaid, assuming they were entitled to claim the same, after deducting the amounts advanced and paid as aforesaid, would not have amounted to more than 75 dollars, 15 cents, which, calculating the dollar at 4s. 2d., which is the full value thereof, amounts to 15l. 15s. 8d., and no more; that, if no payments had been made to or on account of the plaintiff and his wife, the plaintiff's claim in respect of himself and his wife together, at the time of their desertion as aforesaid, would not have exceeded 93 dollars, or 19l. 7s. 6d.; that the defendant is not and never was indebted to the plaintiff in 20l. 13s. 6d., as alleged in his affidavit, nor in 20l., and that, for the reasons stated in that affidavit, he was not indebted to him in any amount whatsoever; that the J. F. Chapman is an American ship, and the defendant an American citizen domiciled in the United States, and that the plaintiff and his wife are Americans, domiciled in the said United States; and that the defendant verily believed that his arrest in this action was for the purpose of extortion; and that he was put to great inconvenience and expense by reason of his detention and that of his vessel in consequence thereof.

This summons was opposed, upon the affidavits of the plaintiff and his wife, and of a seaman on board the J. F. Chapman, which stated in substance, that the plaintiff and his wife did not desert the ship, but, on the contrary, were dismissed from their employment by the mate (with the sanction of the defendant) on the second of October, from which day down to the 9th the plaintiff and his wife had been always ready and willing and offered to perform the duties for which they were engaged, but were not permitted to do so; that all the money received by the plaintiff or his wife on account of wages was 1l. 4d. paid to the latter, *485] and given credit for, leaving the amount due as claimed *on the writ of summons; that the defendant was justly and truly indebted to him in the sum of 20l. 13s. 6d., the amount claimed, as follows:—

"10th July to 10th August, 1858, at 35 dollars per month	£7 5 10
"10th August to 10th September, 1858	7 5 10
"10th September to 9th October, 1858	7 5 10
	<hr/>
	21 17 6
"Cash on account	1 4 0
	<hr/>
	£20 13 6"

and that the plaintiff was advised and believed that he could claim compensation for dismissal of himself and wife from the defendant's service without notice, and also for the detention of their clothes by him.

It was contended, on the part of the defendant, before the learned judge, that the affidavits sufficiently showed that the defendant was not at the time of the issuing of the writ indebted to the plaintiff in the sum

of 20*l.*; and that, the claim being for wages under 50*l.*, the jurisdiction of the superior court was ousted by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, ss. 188, 189.

The learned judge refused to make any order.

T. Jones, on the first day of this term, moved for a rule to show cause why the order of the 8th of October should not be rescinded, and the writ of *capias* issued thereunder set aside, and why the money paid to the sheriff and into court should not be repaid to the defendant. It is clear, upon his own showing, that the plaintiff had not at the time of the commencement of the suit a cause of action to the extent of 20*l.*, inasmuch as the three months in respect of which he claims wages did not expire until the 9th of October, *whereas the dismissal took place on the 2d, and the writ of summons was issued on the 8th. [*486 Besides, by the terms of the articles under which the plaintiff and his wife shipped, the plaintiff's claim for wages could not arise until the arrival of the vessel at her port of discharge in the United States: *Cutter v. Powell*, 2 Smith's Leading Cases 1. It may be that the plaintiff may have a cause of action for damages for his improper discharge from the defendant's service. Under the old law, where the defendant was arrested on mesne process, if the affidavit varied as to the cause of action from the declaration, the bail would be released: 1 Archbold's Practice, 9th edit., by Prentice, 699 (citing *Tetherington v. Goulding*, 7 T. R. 80, and *Wilks v. Adcock*, 8 T. R. 27); *Ib.* 732; and by analogy the same practice must prevail under the 1 & 2 Vict. c. 110. [WILLIAMS, J.—The *capias* is not the commencement of the action. Is it not enough that the affidavit discloses a substantial cause of action?] The 188th section of the Merchant Shipping Act, 1854, enacts, that "any seaman or apprentice, or any person duly authorized on his behalf, may sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides,—or, in Scotland, either before any such justices or before the sheriff of the county within which any such place is situated,—for any amount of wages due to such seaman or apprentice not exceeding 50*l.* over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final." And the 189th section provides that "no suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted by or on behalf *of any seaman or apprentice in any court of Admiralty, or Vice-Admiralty, or in the Court of Session in [*487 Scotland, or in any superior court of record in Her Majesty's dominions, unless any owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any justices acting under the authority of this act refer the case to be adjudged by such court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore." This court, therefore, has no jurisdiction over the present cause of action, if it is an action for wages; and, if the plaintiff proceeds for damages for his improper discharge, he is not entitled to the security of the money paid into court. [COCKBURN, C. J.—The plaintiff's claim here arose on

the high seas. Have our justices jurisdiction by the statute in such a case? BYLES, J.—In *Cope v. Doherty*, 27 Law J. Ch. 600, it was held by the Lords Justices, in affirmance of a decree by Vice-Chancellor Page Wood, that, excepting where foreign ships are expressly mentioned, the Merchant Shipping Act, 1854, applies only to British ships.]

Cur. adv. vult.

COCKBURN, C. J.—On the first day of this term, Mr. *Jones* moved for a rule to show cause why an order of my Brother Hill of the 8th ultimo, should not be rescinded, and the writ of *capias* issued thereon set aside, and why the sum of 80*l.* 13*s.* 6*d.* paid to the sheriff in lieu of a bail-bond, and 10*l.* paid by the defendant into court in lieu of bail, should not be paid out of court to the defendant. The rule was moved upon two grounds,—first, that the affidavit upon which the order for the writ of *capias* was obtained contained a statement of a cause of action which, *488] when the *circumstances came to be investigated, the plaintiff could not sustain,—secondly, that this court had no jurisdiction over the subject-matter of the action. As to the first ground, the facts appear to be these,—The plaintiff had applied for and obtained an order for the defendant's arrest, upon an affidavit alleging the cause of action to be a claim for wages due to the plaintiff and his wife, as part of the crew of an American vessel, for services rendered by them on board the vessel upon the high seas. An affidavit has been produced before us, from which it appears that an agreement had been entered into between the plaintiff and his wife and the defendant, the captain of the vessel in question, whereby the plaintiff and his wife were to perform certain services on board the vessel, in consideration of which they were to receive wages at so much per month, but were to be precluded from demanding payment until the termination of the voyage. On the part of the defendant, it was submitted, that, under these circumstances, the plaintiff could not recover in this action as upon a claim for wages, but must have recourse to a special action upon the contract for the improper discharge of himself and his wife before the arrival of the period at which the stipulated wages would be payable under the contract; and therefore the defendant calls upon us to order the restitution of the money paid by him as the condition of his liberation, on the ground of the analogy which is said to exist between this case and the old practice as to bail-bonds when arrest upon mesne process was allowed; and our attention was called to some authorities showing that if a party had been arrested upon an affidavit disclosing one ground of action, and the plaintiff afterwards proceeded to declare for another and a different cause of action, the bail would have been relieved from their obligation *489] on the bail-bond. *Supposing, however, we should be of opinion that there was any analogy between the two cases, there would be this obvious answer to the present application, viz. that the motion is at all events premature; for, under the old practice, I take it, the court would not have allowed the merits to be tried upon affidavit, and it could not appear that there was such departure from the original cause of action, until the plaintiff had proceeded in the cause. Now, at present, the plaintiff in this case has not declared; and we do not know with any degree of certainty how he will proceed. But then it is said that the statute 1 & 2 Vict. c. 110 requires something more, viz. that the judge shall be satisfied that there is a cause of action, and therefore

that the defendant is entitled to go into the merits upon affidavit, and, if he can show that the true cause of action is different from that which the plaintiff has alleged in his affidavit, he is entitled to all the advantage he would have had under the old law if the plaintiff had proceeded to declare for a different cause of action from that for which he had held the defendant to bail. The answer to that argument appears to me to be this,—that it is by no means clear and certain that the plaintiff will not proceed upon the cause of action stated in his affidavit; and it is possible that there may be some circumstances which may entitle him to maintain the action, although the contingency upon which the right to demand payment of the wages has not happened. It may be that the plaintiff is not bound to resort to an action for his improper discharge. And indeed it must be recollected that that doctrine is but of modern introduction; and the plaintiff may wish to have an opportunity of questioning it in a court of error; and I do not think we ought to interfere to deprive him of the opportunity of so doing. Independently, however, of that, even if the court were *prepared to say that the plaintiff's only remedy, under the circumstances, is, by an action for wrong- [*490 fully dismissing him, it seems to me that there is no reason why the court should interfere. All that is required under the statute 1 & 2 Vict. c. 110, is, that the judge shall be satisfied that there is a cause of action. I entertain a strong opinion, that, if the judge is satisfied that a cause of action exists, it is not for him to inquire into the particular form of action. And, even if it should appear to him that the plaintiff is about to pursue a mistaken or erroneous course of procedure, I think it is no part of the judge's duty to entertain that question. If satisfied that the plaintiff has a cause of action, all he has to do, is, to afford him the remedy pointed out by the statute. Of course, the court will not stand by and see its process abused. It was upon that principle that this court proceeded in the case of *Stammers v. Hughes*, 18 C. B. 527 (E. C. L. R. vol. 86). Being satisfied that there was no cause of action at all, and that its process was being abused for the purpose of oppressing and harassing the defendant, the court thought it fit to interfere for her protection. So, here, if the court were satisfied that this action was causelessly brought, and the arrest of the defendant vexatious, and an abuse of its process, it would not be slow to interfere to prevent injustice. But we are not at liberty, at this stage of the proceedings, to enter into a discussion upon the merits of the plaintiff's claim, or to speculate upon what may ultimately turn out to be the rights of the parties. All we have to see, is, that there is a *bonâ fide* cause of action: and of this there seems no doubt, whatever may be the proper form of proceeding to enforce it. I think it would be highly inconvenient, and productive of the most mischievous consequences, if we were to take upon ourselves to determine what may turn out to be a nice and difficult [*491 *question of law, upon a summary application of this nature. Upon the first ground, therefore, I am of opinion that there should be no rule.

Upon the second ground relied on by the defendant, it is urged that the action is improperly brought in this court, because by the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), exclusive jurisdiction is given to another tribunal in all cases of dispute between the owners or master of a merchant ship and any of the crew, where the amount

of wages is under 50*l*. The first observation which arises upon that, is that it may be a question whether the provisions of that act apply at all under the circumstances of this case; and that clearly is not a matter which ought to be decided upon a motion of this sort. And, in the next place, it is to be observed that this argument is founded upon the assumption that the plaintiff will resort to a claim for wages, and not proceed for damages for improper dismissal. It seems to me to be somewhat inconsistent for the defendant to urge these two lines of argument,—that he is entitled to relief because the plaintiff's claim for wages is untenable,—and that the court has no jurisdiction, because a claim for wages (to the amount here set up) must be enforced elsewhere. It is highly inconvenient to call upon us upon a motion of the sort to enter into these speculations. It is enough for us to say that it sufficiently appears that the plaintiff has a cause of action, and that therefore we ought not to interfere to deprive him of that which the statute has given him.

WILLIAMS, J.—I entirely concur in what has fallen from my Lord. All I wish to add, is, that, in refusing this rule, we are not in any degree departing from the principle upon which this court acted in *Stammers v. *492 Hughes*. The court will not interfere unless it clearly appears that the plaintiff has no good cause of action, and that he is using the process of the court for the purpose of oppression and annoyance.

The rest of the court concurring,

Rule refused.

ADAMS and Others v. THE ROYAL MAIL STEAM-PACKET COMPANY. Nov. 4.

By a charter-party, the vessel was to proceed with all convenient speed to Cardiff, and there load from the factors of the freighters a full cargo of coals, *in the customary manner*, no time being mentioned:—Held, that this meant a loading according to the usage of the port, and within a reasonable time, without reference to unforeseen casualties; and, consequently, the loading having been delayed for an unreasonable time, the freighters were not excused by reason of the delay having arisen from difficulties connected with the railway and the collieries, which were beyond their control.

THIS was an action for not loading a ship within a reasonable time.

The first count of the declaration set out a charter-party, dated the 11th of November, 1857, between the plaintiffs, the owners of the ship *Susan*, and the defendants, the Royal Mail Steam-Packet Company, by which it was, amongst other things, agreed that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Cardiff, or as near thereunto as she may safely get, and there load from the factors of the said company a full and complete cargo of coals, *in the customary manner*, but the charterers to have the option of employing labourers for trimming the cargo, at the wages of the port, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, *493] and furniture; and, being so loaded, *shall proceed therewith to St. Thomas's, in the West Indies, and there deliver the same, &c.: Ten days on demurrage to be allowed the said ship over and above the said laying days, at 3*l*. per day (the act of God, the Queen's enemies,

fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage, always excepted): Averment, that the plaintiffs did all things necessary on their part to entitle them to have the agreed cargo loaded, to wit, within a reasonable time in that behalf; that the time for so doing had elapsed before suit; yet that the defendants made default in loading the said cargo for a long and unreasonable time in that behalf, although they were not prevented from loading as aforesaid by the act of God, the Queen's enemies, or any other excepted cause as aforesaid.

There was also a count for demurrage.

The defendants pleaded, to the first count, that the defendants did load the said cargo within the time allowed by the said charter-party for so doing; and, to the second count, never indebted. Issue thereon.

The cause was tried before Watson, B., at the last assizes at Bristol, when the facts which appeared in evidence were as follows:—The *Susan* arrived at Cardiff on the 17th of November, 1857. Messrs. Nixon, the coal-fitters there, who were employed by the defendants to load the vessel, had at that time twelve other vessels waiting to be loaded in turn according to the custom of the port before the *Susan*. In consequence, however, of a dispute between the Taff Vale Railway Company, along whose line the coal had to be brought from the collieries to the place of loading, and the Messrs. Nixon and other coal-owners respecting the rates of carriage, a delay of several days occurred in the delivery of the coals; and, when this impediment was removed, further *delay was occasioned by a strike for wages amongst the colliers: [*494 the loading of the *Susan* was consequently not completed until the 26th of January, 1858. The plaintiffs claimed demurrage from the 1st of January. There was no time specified in the charter-party for the loading.

The learned judge told the jury, that, by the terms of the charter-party, the plaintiffs were entitled to have their vessel loaded within a reasonable time if the port was clear; and that they were not to take into their consideration the delay arising from the disputes with the railway company and the strike among the colliers.

The jury returned a verdict for the plaintiffs, damages 86*l.* 4*s.* 8*d.*

Montague Smith, Q. C., now moved for a new trial, on the ground of misdirection. By the terms of the charter-party, the defendants were to load on board the vessel at Cardiff a full cargo of coals *in the customary manner*, which must necessarily involve the customary manner of obtaining as well as of loading the coals. It was, therefore, misdirection on the part of the learned judge to tell the jury that they were not to take into their consideration, in determining whether or not the defendants had performed their contract, the circumstances which prevented them from completing the loading within a reasonable time. [WILLIAMS, J.—The defendants undertake to load the vessel in a reasonable time for loading her in the customary manner. The circumstances relied on to excuse the breach are circumstances which impeded, not the loading, but the procuring of the coals wherewith to load the vessel. BYLES, J.—It is the defendants' misfortune that they had no coals to put on board. COCKBURN, C. J.—The charter-party contemplates the ordinary state of *things. The defendants should have protected themselves against an extraordinary state of circum- [*495

stances. Suppose the mines had been flooded, so that they could not be worked for a long time, would that have excused the defendants? You contract to have a loading of coals at Cardiff within a reasonable time. By a chain of unforeseen circumstances, you are prevented from performing that contract.] The nearest case to the present is that of *Harris v. Dreesman*, 23 Law J., Exch. 210. There, by a charter-party, the master of a vessel engaged to proceed therewith to a particular colliery, and there take on board from the freighter a full cargo of coal. Before the charter-party was signed, both parties knew that the colliery was not at work, and accident having happened to the steam-engine, and both were told that it would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, according to the practice of the port, which was, that ships were loaded in their regular turns as they were entered on the colliery books. The freighters had no control over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agents had led the parties to expect. It was held, that, if the steam-engine was repaired, and the colliery got to work in a reasonable time after the execution of the charter-party, and if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading. [COCKBURN, C. J.—There, both parties knew the state of things when the contract was entered into. WILLIAMS, J.—Upon what does the court there found its decision?] Parke, B., says: “The vessel was to be loaded within a reasonable time under the circumstances. It is clear, therefore, that the defendants might give evidence of the *usage of the port as to the loading, that the vessel *496] was to be loaded at a particular spout, that the boiler was out of repair, that the colliery in consequence was not at work, and that the defendants had no control over the colliery. The case, however, does not find whether the owner of the colliery repaired the boiler within a reasonable time,—though, if he failed to do so, I doubt whether the defendants would be responsible.”(a) [BYLES, J.—Here there is an absolute engagement on the part of the defendants to load. Can it be any answer for them, that they have got no coals, without any default of their own?] Perhaps not. Upon the authority of *Harris v. Dreesman*, it is submitted the defendants ought to have a rule.

COCKBURN, C. J.—I am of opinion that the ruling of the learned judge was right, and that there ought to be no rule. The present case is clearly distinguishable from *Harris v. Dreesman*, because there the contract was entered into between the parties with full knowledge of the surrounding circumstances, some of which necessarily induced delay in the loading. The decision such as it was, clearly proceeded upon that footing. Parke, B., says “The vessel was to be loaded within a reasonable time *under the circumstances*. It is clear, therefore, that the defendants might give evidence of the usage of the port as to the loading, that the vessel was to be loaded at a particular spout, that the boiler was out of repair, that the colliery in consequence was not at work, and that the defendant had no control over the colliery.” And the conclusion the court seems to have come to, is, that it would be contrary to the sense of the contract to hold the defendants to be respon-

(a) Alderson, B., observed that the court were not unanimous on that question.

sible for a state of things over which they had no *control. But here the parties have entered into a contract without any [*497 knowledge on the part of the plaintiffs to take the case out of the ordinary rule. They must be taken to have contemplated a loading within a reasonable time and under ordinary circumstances. It chanced that extraordinary circumstances arose which prevented the defendants from performing what they had undertaken. They should have taken care to protect themselves by some stipulation, if they contemplated relieving themselves from the consequences of fortuitous or unforeseen impediments to the due performance of their contract.

WILLIAMS, J.—I am of the same opinion. The effect of the charter-party is, that the defendants undertake to have a cargo of coals to load on board the vessel within a reasonable time. They cannot relieve themselves from performing their contract by reason of the impossibility of performance: *Paradine v. Jane*, Aleyn 26. In *Harris v. Dreesman*, 25 Law J., Exch. 210, the contract was framed with reference to the state of things at the colliery at the time. That, therefore, is a very different case from this.

BYLES, J.—I am entirely of the same opinion. From the silence of the contract as to the time at which the loading was to be completed, it follows that the vessel was to be loaded within a reasonable time; and a reasonable time for loading must be a reasonable time under ordinary circumstances. The distinction between this case and *Harris v. Dreesman*, which has been pointed out by my Lord Chief Justice, relieves us from any difficulty in what would otherwise be a very plain case.

Rule refused.

***M'CALLUM v. COOKSON and Another. Nov. 3. [*498**

The plaintiff having obtained a verdict in a county court, the defendants gave notice of appeal under the 13 & 14 Vict. c. 61, s. 14, and the parties being unable to agree upon a case, one drawn by each party was duly submitted to the judge to settle and sign, but, before this was done, the judge died. The court,—without deciding whether or not execution might issue,—refused to grant a prohibition to restrain the new judge from proceeding upon the judgment, or a certiorari to remove the cause.

On the 8th of May, 1858, a plaint was levied in the county court of Newcastle, wherein the plaintiff sought to recover damages against the defendants for the breach of a contract for the sale and delivery of a quantity of sulphuric acid. The case was tried before Mr. Losh, the then judge, and a jury, in August last. Various objections to the plaintiff's right to recover were urged by counsel on the part of the defendants, but overruled by the judge, and a verdict was found for the plaintiff, damages, 50*l*.

Notice of appeal was duly given by the defendants pursuant to the 13 & 14 Vict. c. 61, s. 14, and the rules of practice made under the authority of the 19 & 20 Vict. c. 108, s. 32, and security given for the costs of the appeal and the amount of the judgment. A case was afterwards prepared by the defendants' counsel, and sent to the plaintiff's attorneys for approval; but, they not being satisfied with the statements therein, another case was prepared by them and submitted to the defend-

ants' attorneys. This being also disapproved of by the defendants' attorneys, the two cases were transmitted to the judge, in order that he might settle the same pursuant to the 15th section of the 13 & 14 Vict. c. 61.

According to the practice of the county court, rule 145, the case on appeal is to be presented to the judge for signature at the court holden next after the expiration of twelve clear days from the day on which judgment was pronounced. But, in consequence of the illness of the judge (which ultimately terminated in his death), his signature could not be obtained: and, the gentleman who then presided as his deputy *499] being ignorant of the facts, and therefore not in a condition to settle and sign the case, it was ordered, upon the application of the defendants' attorneys, that the matter should stand over until the 6th of November. The judge died on the 1st of October, and a new judge had since been appointed in his place. Under these circumstances,

Udall, for the defendants, applied for a rule to show cause why a prohibition should not issue to the judge of the county court, to restrain him from issuing execution upon the judgment, on the grounds that the steps taken towards the appeal had taken the case out of the court's jurisdiction; or why a certiorari should not issue to bring up the plaint to be retried in this court. The 14th section of the 13 & 14 Vict. c. 61 enacts, "that, if either party in any cause of the amount to which jurisdiction is given to the county courts by this act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster: provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party, or his attorney, and also give security, to be approved by the clerk [registrar] of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be defendant and the appeal be dismissed: provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the county court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk [registrar] of the county court in which such *500] action shall have been tried, and the same shall have been paid accordingly: and the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper; and such orders shall be final." And the 15th section enacts "that such appeal shall be in the form of a case agreed on by both parties, or their attorneys, and, if they cannot agree, the judge of the county court, upon being applied to by them or their attorneys, shall settle the case and sign it; and such case shall be transmitted by the appellant to the rule department of the masters' office of the court in which the appeal is to be brought." [WILLIAMS, J.—The case which has arisen is not provided for by the statute.] By the 139th rule it is provided, that "any party dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of evidence, may, before the rising of the court on the day on which judg-

ment was pronounced, deliver to the registrar a statement in writing, signed by him, his counsel or attorney, containing the grounds of his dissatisfaction; and, in the event of no such statement being delivered, the successful party may proceed on the judgment unless the judge shall otherwise order; but the judge may direct proceedings to be taken on the judgment notwithstanding such statement has been delivered: provided that the party so dissatisfied may appeal on grounds different from those contained in such statement, and although he shall not have delivered any such statement." The 142d rule provides, that, "if, before the notice of appeal is served upon the registrar, execution shall have issued, and the amount of the judgment and costs of execution shall have been paid into the hands of the bailiff, or levied and not paid over to the successful party, the same *shall remain in court to abide the order of the court." And the 143d, that, "if, before [*501 an appealing party shall have given the required security, execution shall have issued, the registrar shall, upon the appealing party's giving security, forthwith send notice thereof, by post or otherwise, to the bailiff, and proceedings on such execution shall forthwith be stayed." The county court has no jurisdiction to go on, the execution being stayed until the appeal is determined. [CROWDER, J.—Provided all the steps requisite to the perfecting the appeal have been taken.] The appellants have taken all the steps which they *could* take to perfect the appeal. [COCKBURN, C. J.—If the delivery of the appeal case to the judge operates a stay of the proceedings, why are we to assume that the county court will proceed? There is nothing in the act to restrain the execution under the circumstances. You say the practice rules have that effect. Why, then, are we to assume that the new judge will exceed his duty? WILLIAMS, J.—The effect of a prohibition would be to deprive the plaintiff of the fruits of his judgment. CROWDER, J.—What is the consequence, in the superior court, of the death of the judge before sealing a bill of exceptions?] This court decided in *Newton v. Boodle*, 3 C. B. 795 (E. C. L. R. vol. 54), that, in that case, it is not competent to any other judge to affix the seal, but that the proper course was to direct a new trial, notwithstanding the lapse of time.(a) In *Ex parte M'Fee*, 9 Exch. 261,† it was held, that, where a county court judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the county court rules, and on that ground refuses to hear the claimant, prohibition lies to stay further proceedings under the execution, provided the particulars are such as ought to have been held *sufficient. Parke, B., there [*502 says: "The jurisdiction of the county court judge to go on with the plaint is taken away as soon as the claim is properly put forward." [WILLIAMS, J.—In that case, the judge ought to have interfered to prevent the execution.] At all events, the defendants are entitled to a certiorari, for the difficulties in point of law. That would have the effect of a new trial in this court. [COCKBURN, C. J.—The cause has been tried. Up to the present time nothing has been done wrong. The statute 13 & 14 Vict. c. 61 gives you an appeal, subject to certain conditions. Why should we have the proceedings brought up by certiorari?] It is difficult to see what other remedy there is.

(a) And see *Bennett v. The Peninsular and Oriental Steamboat Company*, 16 C. B. 29 (E. C. L. R. vol. 81).

COCKBURN, C. J.—The question is, whether the appeal still continues, or whether the proceeding has not become abortive by the death of the judge. If the argument urged on the part of the defendants is right, we have no reason to presume that the now judge of the county court will do other than his duty. The application for a prohibition, therefore, is too soon. A certiorari clearly is out of the question. It is doubtful at the present moment which party is in the better position. I think the motion fails on both grounds.

WILLIAMS, J.—I do not say that the county court judge ought to refuse to allow execution to issue upon the judgment. It may be, from the peculiar circumstances, and the event which has happened, that the parties are in the same position as if there had been no appeal at all. We must not be understood as giving any opinion upon that point.

CROWDER, J.—I give no opinion as to whether or not execution should issue under the circumstances. It seems to me that the act of parliament, in providing *for the appeal, has not made any provision *503] for the death of the judge before settling and signing the case. If we were to grant a rule nisi either for a prohibition or a certiorari, I do not see how we could make it absolute upon any of the grounds which have been urged. The death of the judge has prevented the defendants from bringing their appeal in the manner directed by the statute; therefore we cannot direct a new trial. And, by refusing the rule, we do not abstain from doing justice; for, we cannot see whether we should be doing justice or not. In whatever way, therefore, the case might be brought before us, we have no means of dealing with it.

BYLES, J.—I also think there should be no rule. Nobody has done any wrong here. And, according to Mr. *Udall's* argument, the defendants cannot be hurt. I desire to be understood as declining to give any opinion as to whether or not it would be competent to the county court to issue execution under the circumstances.

Rule absolute.

*504] **THE METROPOLITAN ASSOCIATION FOR IMPROVING THE DWELLINGS OF THE INDUSTRIOUS CLASSES v. PETCH.** Nov. 2.

A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights, is sufficient if it show an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right.

THIS was an action for an injury to the plaintiffs' reversionary interest, by the erection of a "hoarding," whereby certain ancient lights of the plaintiffs were obstructed.

The declaration stated, that, before and at the time of the committing of the grievances by the defendant thereafter mentioned, divers messuages or dwelling-houses, with the appurtenances, situate, &c., were respectively in the possession and occupation of certain persons as tenants thereof respectively to the plaintiffs, the respective reversions of and in the said messuages or dwelling-houses then and still belonging to the plaintiffs; and that, before and at the said times when, &c., there were, and still of right ought to be, in each of the said messuages or

dwelling-houses, divers windows through which the light and air during all the times aforesaid ought to have entered, and until the committing by the defendant of the grievances thereafter mentioned did enter, and still of right ought to enter into the said messuages or dwelling-houses respectively for the more convenient and wholesome use, occupation, and enjoyment thereof respectively; yet that the defendant wrongfully and injuriously erected a hoarding near to the said windows respectively, and kept and continued the same so erected from thence hitherto, whereby the light and air during all the times aforesaid were and still are hindered and prevented from entering through the said windows into the said messuages or dwelling-houses respectively, and the said messuages or dwelling-houses respectively had thereby *been [*505 rendered dark, close, uncomfortable, unwholesome, and unfit for habitation; and that, by means of the said several premises, the plaintiffs had been and were greatly injured in their respective reversionary estates and interests of and in the said respective messuages or dwelling-houses, with the appurtenances, so in the possession and occupation of the said respective tenants as aforesaid.

To this declaration the defendant demurred.

Josiah Wilkinson, in support of the demurrer.—The declaration is bad, inasmuch as it does not disclose any injury to the plaintiffs' reversion. The word "hoarding" necessarily implies an erection of a temporary character. In Webster's Dictionary, the definition given of the word is, "a fence enclosing a house and materials which builders are at work upon." [WILLIAMS, J., referred to *Shadwell v. Hutchinson*, M. & M. 350 (E. C. L. R. vol. 22).] In *Shadwell v. Hutchinson*, the erection complained of was a skylight, which was necessarily meant to be permanent. In *Bradbee v. The Mayor, &c., of London*, 5 Scott, N. R. 79, 4 M. & G. 714 (E. C. L. R. vol. 43), a hoarding was treated as a mere temporary obstruction. The concluding allegation, that, by means of the premises, the plaintiffs were injured in their reversionary estates and interests, does not help. The plaintiffs seek to bring themselves within the case of *Kidgill v. Moore*, 9 C. B. 364 (E. C. L. R. vol. 67), but that which they allege shows no cause of action. In *Jackson v. Peaked*, 1 M. & Selw. 234, Lord Ellenborough says: "The count does not import in terms that any act charged upon the defendant was injurious or to the damage of the plaintiff: the declaration does, indeed, contain the usual conclusion, 'wherefore the plaintiff saith he is injured and hath sustained damage, &c.': but this is not matter of charge in the declaration, it is only the resulting inference of damage drawn [*506 *by the plaintiff from the matter of charge; and, unless the count, which is the matter of charge, warrants such inference, it has no effect." So, here, the charge is of a temporary obstruction only; and therefore the resulting inference of damage to the reversion is idle. All the precedents show an obstruction of a permanent character, so as to affect the plaintiff's reversionary interest: 2 Chitty on Pleading, 7th edit. 589 et seq. [WILLIAMS, J.—You must show that the thing complained of cannot possibly be an injury to the reversion.] In *Baxter v. Taylor*, 4 B. & Ad. 72 (E. C. L. R. vol. 24), it was held that a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way; such an act during the tenancy not

being injurious to the reversion. Patteson, J., there said: "To entitle a reversioner to maintain an action on the case against a stranger, he must allege in his declaration, and prove at the trial, an actual injury to his reversionary interest. It is said that this action is maintainable, because the plaintiff's title may be prejudiced by a trespass committed under a claim of right; but then for such an injury the action must be brought in the name of the tenant, who is the person in the actual possession of the land." And Parke, J., said: "To entitle him to maintain this action, it was necessary for the plaintiff to allege and to prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right, is not necessarily injurious to the reversionary estate." In *Bower v. Hill*, 1 N. C. 549 (E. C. L. R. vol. 27), 1 Scott 526, Tindal, C. J., says: "The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, *507] it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction apparently permanent to lights and other easements which belong to the reversion." In *Hopwood v. Schofield*, 2 M. & R. 34 (E. C. L. R. vol. 17), it was held that a reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right. In *Mumford v. The Oxford, Worcester, and Wolverhampton Railway Company*, 1 Hurlst. & N. 34,† it was distinctly held, that, in order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. Therefore, it was held that a reversioner could not maintain an action against a railway company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house, except at a lower rent. "A reversioner," says Alderson, B., "cannot maintain an action for an injury not necessarily permanent. This injury is not in its nature permanent." Here, the declaration does not show an injury necessarily permanent. [WILLIAMS, J.—It is consistent with this declaration that the defendant may have insisted on a denial of the right to the lights.] Hardly. In *Simpson v. Savage*, 1 C. B. N. S. 347 (E. C. L. R. vol. 87), Cresswell, J., in delivering the judgment of the court, says: "After considering the authorities, we are of opinion, that, since, in order to give a reversioner an action of this kind, there must be some injury done to the inheritance, the necessity is involved of the injury being of a permanent character. The earliest instances of such an action are, cutting trees, subverting the soil, and erecting a dam across a stream so as to cause it *508] to flow over the plaintiff's land. In the two former cases, the thing done was not removable or remediable during the term: in the third it was; but, being of a permanent character, it was to be assumed that it would remain, and therefore was treated as an injury to the inheritance. The decision in *Jesser v. Gifford*, 4 Burr. 2141, falls within the same principle. A window was obstructed: the obstruction was of a permanent character, and would remain, unless something was done to remedy the evil. *Tucker v. Newman*, 11 Ad. & E. 40 (E. C.

L. R. vol. 39), 3 P. & D. 14, belongs to the same class." The case of *Kidgill v. Moor*, 9 C. B. 364 (E. C. L. R. vol. 67), will probably be relied on by the other side. There, a declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way; and that, by means of the premises, the plaintiff was injured in his reversionary estate: and it was held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction *might* occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given. Cresswell, J., there says: "It is impossible to say that a gate *may* not be so fastened as to enure as an injury to the reversion." That case is totally beside the present.

Kemplay, contra (with whom was *Knowles*, Q. C.), was not called upon.

COCKBURN, C. J.—I am of opinion that our judgment in this case must be for the plaintiffs. I think the declaration is sufficient. It alleges, that, the plaintiffs being entitled to the reversion in certain messuages or *dwelling-houses in which there were divers windows through [*509 which the light and air entered, and of right ought to enter, the defendant wrongfully and injuriously erected a hoarding near to the said windows, whereby the light and air were prevented from entering, and the dwelling-houses became dark and unfit for habitation, and by means thereof the plaintiffs were injured in their reversionary estates in the said dwelling-houses. It has been contended on the part of the defendant, that this declaration is bad, on the ground that it shows only a temporary and not a permanent injury to the reversion. If it had appeared upon this declaration, as it did in many of the cases to which our attention has been directed, that the injury complained of was necessarily temporary, and could not be otherwise, I should have agreed with *Mr. Wilkinson*; it being clear, that, to entitle a reversioner to maintain an action of this sort, there must be an injury of a substantial and permanent character. It is contended that a "hoarding," according to the definition given in Webster's Dictionary, where it is said to be "a fence enclosing a house and materials while builders are at work," must necessarily be understood to mean something of a mere temporary character. I do not, however, think that necessarily follows; and, however much one may respect that very learned work, we cannot hold ourselves bound by its authority. No doubt, a hoarding is a thing which is commonly put up for a temporary purpose; but it is impossible to say that a hoarding may not be erected which shall be of so permanent a character that the right of the reversioner may be thereby injured.(a) It would, therefore, be *going too far to say that the [*510 nuisance complained of in this declaration could not be of such a nature as to be injurious to the plaintiffs' reversionary interest in the adjoining premises. The case of *Kidgill v. Moor*, 9 C. B. 364 (E. C.

(a) Many persons will doubtless recollect the "hoarding" which for considerably more than twenty years disfigured the principal entrance to the Inner Temple, and which was put by order of the benchers of that Honourable Society for the express purpose of permanently obstructing certain windows of the adjoining premises.

L. R. vol. 67), which was referred to, shows that it is sufficient if the injury be of such a nature that it *might* be permanent. It is impossible for us to say that this may not be of that character, especially as the declaration avers that by means of the premises, that is, the erection of this hoarding, the plaintiffs had been and were injured in their reversionary estates and interests of and in the respective messuages, &c. Of course, it will be for the plaintiffs to establish that by evidence at the trial. Before they can recover, they must show that the act of the defendant has operated a permanent injury to their reversionary interest. If they show only a temporary injury or inconvenience, they will fail. But it is not for us, at this stage of the proceedings, to decide that they have not a cause of action.

WILLIAMS, J.—I am of the same opinion. In considering this declaration, it must be borne in mind that there cannot be a special demurrer on the ground that the language in which the cause of action is described is not sufficiently explicit. It is enough if we see substantially that the facts stated, if proved, may operate injuriously to the reversion. The simple question, therefore, which we have to decide is, whether, upon this declaration, we can see that it is impossible that the hoarding can be otherwise than a temporary structure, and so not injurious to the reversion. If at the trial it appears that the thing complained of is of a *mere transitory character, the jury will come to the conclusion that it is not such an injury as to entitle the plaintiffs to maintain the action. But it may be that this hoarding may have been kept up in denial of the right of the plaintiffs to the windows in question; in which case, if acquiesced in by the plaintiffs for any length of time, it might furnish a serious body of evidence against them if ever their right should come to be contested. In *Simpson v. Savage*, 1 C. B. N. S. 347 (E. C. L. R. vol. 87), the question did not arise upon the form of the declaration, but it was whether or not the evidence in support of the plaintiff's complaint of injury to his reversion was such as ought to have been submitted to the jury. The court there thought that the making the fires and causing smoke to issue was not an act of a permanent nature, so as in itself to be an injury to the reversion. But there are abundant authorities to show that though the thing complained of may not be of a permanent character in the sense of lasting many years, yet it may be so set up as to be permanent in the sense of its enuring as an injury to the reversion. The cases cited by Mr. *Wilkinson* almost all of them contain some confirmation of that principle. In *Bower v. Hill*, 1 N. C. 549 (E. C. L. R. vol. 27), 1 Scott 526, the defendants having erected, on their own premises, a permanent obstruction to a navigable drain leading from a river through the defendants' premises to the plaintiff's close,—it was held, that an action lay for the plaintiff, notwithstanding the portion of the drain which passed through the plaintiff's close had for sixteen years been completely choked up with mud. In giving judgment, Tindal, C. J., said: "We think the erection of the tunnel is in the nature of, and, until removed, is to be considered as, a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he receive no immediate damage thereby."
 *512] *The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of

the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises: *Jesser v. Gifford*, 4 Burr. 2141." So, in *Hopwood v. Schofield*, 2 M. & Rob. 34, Pattenon, J., puts it that a mere obstruction of a right of way may be an injury to the reversion. He says: "I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case; but *Jackson v. Pesked*, 1 M. & Selw. 234, and all the authorities, show that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent which it is in evidence can be redressed in a few days? If, indeed, there had been any obstruction operating in denial of the right, it might have been different." So, in *Shadwell v. Hutchinson*, M. & M. 350 (E. C. L. R. vol. 22), the action was brought for an injury to the plaintiff's reversion by obstructing an ancient window: the obstruction was by means of a skylight placed over an area into which the window in question looked: it was objected, on the part of the defendant, that the nuisance complained of was not any present injury to the reversion, nor of a permanent nature; that in two or three days the premises might be put into the same situation as they were before that which gave rise to the action had been done; and that, long before the right of the reversioner accrued, the injury might cease to exist. But Lord Tenterden held, as to the first point, "that the action will lay, because the injury complained of was an injury to the right; and that, if a reversioner were to be prevented from *bringing his [*513 action during the existence of the lease, the testimony of the witnesses who could speak to the window being an ancient window, might be lost." Then there is the case of *Kidgill v. Moor*, 9 C. B. 364 (E. C. L. R. vol. 67), which appears to me completely to govern the present case. There, a declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way; and that, by means of the premises, the plaintiff was injured in his reversionary estate: and it was held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction *might* occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given. There is no distinction now between the construction of a declaration before and after verdict. The obstruction here complained of *may* be an injury to the plaintiffs' reversionary interest, and therefore we cannot consistently with the authorities hold the declaration to be insufficient.

WILLES, J.—I am of the same opinion. The declaration in an action of this sort must either state something which is necessarily an injury to the reversion, as, the cutting down timber-trees, or the like; or, if it state something else which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured. Where that which is stated *cannot* be injurious to the reversion, the allegation that the reversion is thereby injured will not help the plaintiff. Where it *must* be an injury to the reversion, that

*514] concluding allegation is *unnecessary. Here, the thing complained of *may* be injurious to the reversion, as, by affording evidence in denial of the right, and therefore we cannot say that the declaration is bad.

BYLES, J.—I am of the same opinion. It seems to me that, even adopting Mr. *Wilkinson's* argument, a “hoarding” is something that may or may not be an injury to the reversion. I therefore agree with the rest of the court in thinking that the declaration is sufficient.

Judgment for the plaintiffs.

It is well settled that for an encroachment under a claim of right, which is inconsistent with the rights of a reversioner, he is entitled to maintain action, though the immediate injury may be merely nominal. It is sufficient if it be of a permanent character: *Schnable v. Koehler*, 28 Penn. St. 184; *Ripka v. Sergeant*, 7 Watts & Serg. 13; *Starr*

v. Jackson, 11 Mass. 519. See *Baker v. Sanderson*, 3 Pick. 348; *Sumner v. Tileston*, 7 Pick. 198; *Hall v. Snowhill*, 2 Green 8; *Randall v. Cleaveland*, 7 Conn. 328; *Tobey v. Webster*, 3 Johns. 468; *Hilliard v. Dutch*, 3 Hawks 246; *Elliott v. Smith*, 2 New Hamp. 430.

BLATCHFORD, Appellant, COLE, Respondent. Nov. 30.

The remedy for double value given by the 4 G. 2, c. 28, s. 1, against a tenant wilfully holding over after the determination of the term, and after demand and notice in writing, is given only to the lessor or landlord, or the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term, —such new lessee having no estate, but a mere *interesse termini*.

THIS was an appeal from a decision of the judge of the county court of Devonshire, holden at Tavistock.

The action was brought to recover 37*l.* 2*s.* 6*d.*, for double the yearly value of an inn, farm, and lands, situate within the district of the said county court, which the defendant, as the plaintiff alleged, wrongfully held over from the 25th of March, 1858, until the commencement of this action, contrary to the statute 4 G. 2, c. 28, s. 1.

On the 12th of March, 1857, William Perkin, being possessed of the said premises for a term of years not yet expired, and determinable on lives still existing, let the same by parol to the defendant as tenant from year to year so long as both parties pleased, from the 25th of March, 1857, at the annual rent of 53*l.* The *defendant took possession of the premises under that agreement.

On the 22d of September, 1857, the said William Perkin served the defendant with a notice in writing, signed by the said William Perkin, requiring the defendant to quit and deliver up the possession of the said premises on the 25th of March then next ensuing, and now last past, being the end of the current year of the said tenancy, which notice was sufficient to determine the tenancy, and did determine it, unless waived by any reletting by the said William Perkin of the premises, of which the judge refused to receive evidence, as hereinafter mentioned.

On the 6th of February, 1858, the said William Perkin, by lease

under seal, demised to the plaintiff the said premises, to hold the same to the plaintiff from the 25th of March then next, and now last, for seven years thence ensuing, subject to a yearly rent of 48*l*. The said indenture of lease is still in force, and the defendant had notice of it before the said 25th of March last.

The defendant did not on the said 25th of March last, or at any other time, quit or deliver up possession of the said premises to any one, and has thence until the commencement of this action held over the same; notwithstanding the said determination of his tenancy, alleging that the said William Perkin had relet the said premises to him on the 9th of April, 1858, being subsequently to the execution of the said lease to the plaintiff; but the judge refused to receive evidence of such letting, being of opinion, that, if the plaintiff could maintain the action at all, nothing which occurred subsequently to the granting of the lease to him would affect his title.

The plaintiff has from the said 25th of March last been, and he still is, the person entitled to the *possession of the said premises under the said indenture of lease so granted to him as aforesaid. [*516]

No rent has ever been paid by the defendant to the plaintiff, nor has any rent ever been demanded by him; nor has there been any demand in writing of possession given to the defendant by the plaintiff; nor has the defendant in any way recognised the plaintiff as his landlord.

The sum of 37*l*. 2*s*. 6*d*. is at the rate of double the yearly value of the said premises during the time the defendant has since the determination of his said tenancy held over and detained possession of such premises as aforesaid; the yearly value thereof being 53*l*.

The plaintiff brought this action to recover the said 37*l*. 2*s*. 6*d*. for and in respect of the defendant's said over-holding of the said premises.

The cause was heard on the 21st of August, 1858: and the learned judge of the county court, on the 18th of September, 1858, delivered judgment, nonsuiting the plaintiff, on the ground that he was not the proper person to bring the action; that he was neither reversioner, remainder-man, nor assignee, within the meaning of the statute 4 G. 2, c. 28, s. 1, and had only an interesse termini in the premises; and that the action was brought in the name of the wrong person, there being no privity between the plaintiff and the defendant.

The question for the opinion of the court is, whether the plaintiff is or is not the proper person to bring the above action.

Collier, Q. C., for the appellant.—The plaintiff is clearly the proper person to bring the action. The 1st section of the 4 G. 2, c. 28, enacts, "that, in case any tenant or tenants for any term of life, lives, or years, or other person or persons who are or shall come into *possession of any lands, tenements, or hereditaments, by, from, or under, or [*517] by collusion with, such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized,—then and in such case such person or persons so holding over, shall, for and during the time he, she, and they shall so hold over or keep the person or persons entitled out of posses-

sion of the said lands, tenements, and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of His Majesty's courts of record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail; against the recovering of which said penalty there shall be no relief in equity." [COCKBURN, C. J.—Unless the plaintiff is assignee of the reversion, what privity of contract is there?] The plaintiff *is* the assignee of the reversion: but it is not necessary to go that length: the statute requires no privity; it is enough to say that he is "the person entitled to the possession" of the land. [COCKBURN, C. J.—Assuming that the defendant will give up the possession of the premises at the expiration of his tenancy, Perkin grants a lease to the plaintiff, to commence from the time of the expiry of the defendant's tenancy, viz., the 25th of March, 1858. CROWDER, J.—The plaintiff was put into possession by the landlord from that day.] Yes.

*518] The simple question is, whether *the plaintiff is the person entitled to the possession, within the statute. [COCKBURN, C. J.—Are not the words of the statute to be construed with reference to the person entitled to the reversion?] The lessor is not entitled to the possession. [COCKBURN, C. J.—He is entitled to the possession for the purpose of delivering it to his lessee. A person coming into the rights of the landlord may avail himself of the remedies which the landlord would have had. But here the plaintiff stands in the place of the tenant, not in that of the landlord.] The landlord has parted with all his interest to the plaintiff for all purposes. [COCKBURN, C. J.—Except the remedy for double value.] The plaintiff has an *interesse termini* from the expiration of the defendant's term. [WILLIAMS, J.—There is a precedent in Pearson's Chitty, p. 156, of a declaration against a tenant for not delivering up possession, whereby the superior landlord recovered double rent and costs against the plaintiff. Could the plaintiff have brought ejectment, before entry?] Ryan v. Clark, 14 Q. B. 65 (E. C. L. R. vol. 68), shows that he could. Patteson, J., in delivering the judgment of the court, there says: "It is distinctly laid down in Williams v. Bosanquet, 1 Brod. & B. 238 (E. C. L. R. vol. 5), 3 J. B. Moore 500 (E. C. L. R. vol. 4), that entry is not necessary to the vesting of a term of years in the lessee; the interest and the legal right of possession, where the term is to commence immediately, and not in future, vests in the lessee before entry; and, of course, the right of possession in the lessor is gone, though, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession." The same distinction is taken by Lord Denman in Doe d. Parsley v. Day, 2 Q. B. 147, 156 (E. C. L. R. vol. 42), 1 Gale & D. 493. "In the present case," he says, "the action is not trespass, but ejectment: and, as the mortgagee, before entry into the leasehold part

*519] of the *premises, had an *interesse termini*, which was sufficient (Sheppard's Touchstone, p. 269, Co. Litt. 46 b) to enable him to demise to John Doe, whose entry is admitted, any technical difficulty as to trespass not lying is avoided; and, with respect to the freehold part of the property, none ever existed." An *interesse termini*, after the term has commenced, becomes an actual estate. In Saffyn's Case,

5 Co. Rep. 123 a, a man made a lease for years of certain land, to commence after the determination of a prior term of years then in being; the first lease determined, the second lessee did not enter: he in the reversion entered, and made a feoffment, and levied a fine with proclamations; and afterwards five years passed without entry or claim by the second lessee: and it was held that the lessee was barred; for, when the lessee's future interest had commenced, then he had such an estate as might be divested. It was said at the bar, that, "until the second lessee enters, he has but *interesse termini*, as he had before the first lease determined." But it was answered by the court, that, "by the said feoffment, the second lessee had but a right, for, when his future interest had commencement, then he had such present estate in the land which might be divested, and which he might revest by his entry. As, if a man makes a lease for years, in this case, before the lessee enters he has an estate for years in the land, which he may grant." [WILLIAMS, J.—In *Doe d. Rawlings v. Walker*, 5 B. & C. 111, 118 (E. C. L. R. vol. 11), 7 D. & R. 487 (E. C. L. R. vol. 16), Bayley, J., says: "The right upon a lease to commence in *presenti*, is (except under the statute of uses), until entry, an *interesse termini*, and so is the right upon a lease to commence in *futuro*; and the same rules are applicable to both. Each is a *right* only, not an *estate*. The whole *estate*, notwithstanding such right, is in the lessor. In neither case will a conveyance by the lessee to the lessor operate *as a surrender, nor will a release from the lessor to the lessee operate by way of enlarging the estate. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate: and the lessee may extinguish it by a release to the lessor, but it has all the properties and consequences of a right only, not of an estate." By whatever name it may be called, this is clearly an interest which would go to the executors. [COCKBURN, C. J.—The right to double rent is given to the person entitled to the reversion. A man possessed of a term demises from year to year, and, having given the tenant notice to quit, grants to another a lease for a term of seven years, carved out of his reversion. How can the lessee (who has never entered) be said to have a reversion?] It is submitted that the lessee is a "person entitled," within the meaning of the statute. If he had entered, he would have had an estate. Is he to be in a worse position *quoad* the tenant, because the latter has illegally kept him out of possession? [CROWDER, J.—Must not the person entitled to the profits at the time be the person entitled to the double value?] The person entitled to the profits at the time the liability for double value attached, was the lessee: he, therefore, must be entitled to the double value. [CROWDER, J.—The holding over is against the landlord.] The lessee is the only person who could bring ejectment. [COCKBURN, C. J.—Have you any authority for saying that the landlord could not bring ejectment? Could the tenant set up the lessee's title against him?] He may show that the landlord's title has expired. The landlord has as much parted with his right of entry by granting a lease for seven years, as if he had granted the reversion. [COCKBURN, C. J.—Does it lie in the mouth of a man who is insisting that his tenancy has not expired, to say that his landlord's title has expired?] The lessee, *it is submitted, is the only person ag-
grieved by the tenant's holding over. [*521]

Kingdon, contrâ.—The plaintiff is not assignee of the reversion. In *Smith v. Day*, 2 M. & W. 684,† A., being seised in fee, leased premises to B. for sixty-one years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-one years; and it was held, that, by the lease to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease. In the course of the argument there, Parke, B., says: "The second lessee has no interest whatever till the determination of the first lease, except a mere interesse termini. It is clear that no reversion could pass by that deed, since it is a mere interest in futuro." [WILLIAMS, J.—There is no doubt about that. COCKBURN, C. J.—Who is to maintain ejectment?] The lessee having a mere interesse termini, the landlord alone had such an interest as to maintain ejectment. In Bacon's Abridgment, *Leases and Terms for Years* (M.) it is said, that, "at common law, no lease for years, whether it were with or without any reservation of rent, was looked upon to be complete till an actual entry by the lessee; for, though the lessor had done all on his part to perfect the contract, so that he could not afterwards any way derogate from it or avoid it, yet, till there was a transmutation of the possession by the actual entry of the lessee, it wanted the chief mark and indication of his consent thereto, without which it might be unreasonable to adjudge him in actual possession to all intents and purposes; since it might so happen that such lease was made in his absence, and when he knew nothing of it, and perhaps might be so encumbered as to bring a load upon him rather than any advantage. For these reasons (amongst *522] others), the law could not *cast the immediate and actual possession upon him nolens volens; and therefore it was, that, till actual entry, he could not maintain an action of trespass or ejectment, because those actions, complaining of an immediate violation of the possession, could not be proper for him who had no actual possession." That is a distinct authority to show that the plaintiff could not have brought ejectment. If so, who could? Why clearly the lessor only. In *Doe d Parsley v. Day*, 2 Q. B. 147 (E. C. L. R. vol. 42), 1 Gale & D. 493, the difficulty was got over by the admission of the entry by John Doe. The defendant could not have maintained an action at common law for rent, before entry. That was decided by the case of *Turner v. Cameron's Colbrook Steam Coal Company*, 5 Exch. 932,† where it was held that trespass will not lie against the occupier of land, at the suit of the mortgagee, who has never been in actual possession or been seised of the land, and has not obtained a judgment in ejectment, either by default or verdict; and therefore he cannot in such case waive the tort, and maintain an action for use and occupation. Parke, B., in giving judgment, said: "We are all clearly of opinion that the plaintiff was not in a condition to bring an action of trespass, inasmuch as he was mortgagee out of possession: he never had entered upon the property at the time of the trespass committed, and never was in actual possession. He could only have maintained one in case he had brought an ejectment and laid the demise at an antecedent period, and the defendants had either suffered judgment by default as tenants in possession, or there had been a verdict on the trial; and then the defendants would have been in the condition of admitting the lease, and consequent entry to make the lease, and therefore the plaintiff would have been in possession, by the

fiction in ejectment, from the time of the demise. But here *no
ejectment has been brought, and consequently the plaintiff never [*523
was in a situation to maintain an action of trespass at all." The fiction
no longer existing, he would have no right to bring ejectment. [CROW-
DER, J.—The Common Law Procedure Act does not alter the law in
that respect.] The question is, who was the person entitled to the
possession at the time the notice to quit expired. Clearly the landlord.
[COCKBURN, C. J.—The tenant by his contract engages to give up
possession to the landlord. As against him, therefore, the landlord
must be the person entitled to possession. The question is, whether,
the statute having spoken of "the person to whom the remainder or
reversion shall belong," that does not give the key to the meaning of
the subsequent part of the enactment.] That view is fortified by the 11
G. 2, c. 19, which is in the *pari materia*, the 18th section of which gives
the right to recover double rent, where a tenant, having given notice
to quit, holds over, to "the landlord or landlords, lessor or lessors."

Collier, in reply.—The 4 G. 2, c. 28, s. 1, contemplates a case where
there is no privity of contract. It purposely uses different language
from that found in the 11 G. 2, c. 19, s. 11. The word "value" is used
instead of "rent," apparently for the purpose of excluding the necessity
of showing the relation of landlord and tenant. The 4 G. 2, c. 28,
gives the remedy to the person entitled to the possession: and, accord-
ing to the judgment of the Court of Queen's Bench in *Ryan v. Clark*,
14 Q. B. 65 (E. C. L. R. vol. 68), "the right of possession in the lessor
is gone" by the lease. He has parted with his right of entry for the
seven years for which he has granted the premises to the lessee.

COCKBURN, C. J.—I entertain no doubt whatever that *the [*524
decision of the judge of the county court in this case was right,
and that the plaintiff is not in a position to maintain the action. The
statute 4 G. 2, c. 28, s. 1, was intended to give the action for double
value against a tenant wilfully holding over after the determination of
the term, and after demand made and notice in writing given for deliver-
ing the possession of the premises, to the landlord or lessor, or to any
person standing in his place as reversioner or remainder-man. Mr.
Collier contends that the words of the statute, "the person or persons
entitled," mean any one who may have derived a fresh title from the
landlord. I am of opinion that that is not the true construction. As
regards the tenant, the person entitled to the possession is the landlord,
whether for the purpose of enjoying it himself or of giving the posses-
sion to a new tenant; and it is plain that it is to him that the remedy
was intended to be given. The words are clearly capable of that con-
struction. And, when we look at the words of the corresponding statute,
11 G. 2, c. 19, s. 18, whereby tenants holding over after having given
notice to quit are made liable to double rent, the meaning of the former
statute becomes quite clear. The mischief and inconvenience in both
are the same: and it is evident that the legislature intended to apply
the same remedy in the one case as in the other. No doubt seems ever
to have been entertained until it is now for the first time raised, that it
is the landlord and the landlord only to whom the remedy is given.

WILLIAMS, J.—I am entirely of the same opinion. It is probable
that this was one of the very cases contemplated by the legislature when
passing the 4 G. 2, c. 28. When a lease is drawing to a close, the land-

*525] lord naturally looks out for a new tenant: and, if *the old tenant, in defiance of his landlord's right, wilfully refuses to give up possession, such refusal is a grievance brought upon the landlord, for which the statute gives him a right to claim double value by way of compensation.

CROWDER, J.—I am of the same opinion. I think the true construction of the statute 4 G. 2, c. 28, s. 1, is, that the person entitled to the possession, as between him and the tenant, must be the landlord or some person standing in the shoes of the landlord. I see no reason for giving a wider construction to the words. Take the case between landlord and tenant only, and the tenant holding over as against his landlord after notice,—who would be the person entitled to the possession? Clearly the landlord. The person who stands in the relation of a reversioner is in the same position. I am of opinion, therefore, that the judge of the county court was right, and that his decision must be affirmed, with costs.

Decision affirmed, with costs.

The 1st sect. of the statute 4 Geo. 2, c. 28, giving double rent in cases of tenants holding over, is not generally in force in the United States. Similar provisions, however, have been enacted in South Carolina and New York: *Reeves v. M'Kenzie*, 1 Bailey 501; *Hall v. Ballentine*, 7 Johns. 531. The language of the New York statute in respect to the point in the text, differs somewhat from that of the English statute. The words of the latter are, "after demand made and notice in writing given, for delivering the possession thereof by his or their landlords, or lessees, or the person to whom the remainder or reversion of such lands, &c.,

shall belong, &c.," whereas, the words of the former are, "after demand made requiring the possession thereof by the person entitled thereto, &c.," 2 Rev. St., N. Y., 5th Ed., p. 36, § 11. Under similar words to these last, in a Massachusetts statute, it has been held, that a lessee for years was entitled to summary proceedings for the removal of a tenant at will holding over, after the execution of the written lease: *Kelly v. Waite*, 12 Metcalf 300; *Furlong v. Leary*, 8 Cushing 410. See as to the Pennsylvania statute of 1772, for the recovery of possession, *McKeen v. King*, 9 Barr 213; *White v. Arthurs*, 24 Penn. St. 213.

*526]

*OWEN v. WILKINSON Nov. 22.

A joint and several promissory note of A. and three others may be set off against a claim of A. in an action by him against the payee upon a money demand.

THIS was an action for money had and received and for money found due upon accounts stated. The defendant pleaded, amongst others, a set-off in respect of a promissory note dated the 24th of November, 1852, whereby the plaintiff and others *jointly and severally* promised to pay to the order of the defendant, on demand, the sum of 300*l.*, and which note remained unpaid. The plaintiff took issue upon this plea.

The cause was tried before Willes, J., at the second sitting in London in this term. The note, which was put in, was in the following form,—

“£300. 0. 0.

London, Nov. 24th, 1852.

“We, the undersigned, directors of the Counties Union Assurance Company, *jointly and severally* promise to pay to the order of Mr. Joseph Wilkinson, on demand, the sum of 300*l.*, for value received.

“T. W. STRICKLAND.

“G. T. CONDY.

“Henry Owen.

“R. MANSON.”

On the part of the plaintiff, it was submitted that this note could not be made the subject of a set-off against a debt due to the plaintiff alone. The learned judge ruled that it might; and a verdict was entered for the defendant, subject to a motion to enter the verdict for the plaintiff (for an ascertained amount of damages), if the court should be of opinion the ruling was wrong.

Ballantine, Serjt. (with whom was *W. R. Cole*), now moved accordingly.—The note upon the face of it purports to be the joint and several note of the makers, and *to have been given in satisfaction of a [*527 debt of the company. It is not a joint and several debt, but a joint and several engagement to pay a joint debt. The debts therefore are not mutual debts within the statutes of set-off.(a) [WILLES, J.—In *Pothier on Obligations*, by *Evans*, Vol. 2, p. 68, the learned author says: “I am not aware of any authority, that, if one debtor has actually set off a separate debt of his own against a joint and several debt of himself and others, that this could be taken advantage of by the others in any action instituted against them; although it is certainly reasonable that such a set-off should in all respects be regarded as a payment; and this observation applies more forcibly to the case where the creditor has set off the joint and several debt against a demand due from himself to one of the debtors.” That is referred to in *Chitty on Contracts* (6th edit. by *Russell*) 752. It seems to be taken for granted that this could be done. CROWDER, J.—I must confess I should have thought the set-off good. Have you any authority the other way?] None. [BYLES, J.—The point does not seem to have been raised, because nobody thought it worth while.] There is no such mutuality as the statutes contemplated. It appears that *Owen* deposited a check with *Wilkinson*, and that *Wilkinson* received the money. Being sued by *Owen*, *Wilkinson* now seeks to set off a claim in respect of a joint and several promissory note of *Owen* and three other persons. [WILLES, J.—*Fletcher v. Dyche*, 2 T. R. 32, seems to be precisely in point. It was there held, that, if two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with a condition for the due performance of the work or the payment of *the weekly sum, and the work is not finished by the [*528 time,—such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Buller*, J., rested his judgment upon the fact that one only had executed the bond: but *Ashhurst*, J., says: “It would have been difficult for the jury to have ascertained what damages the defendant had really suffered by the breach of the agreement; and therefore it was proper for the contracting parties to ascertain it by their agreement. So that this is a case of

stipulated damages, and it is not to be considered as a penalty. If so, and the parties have entered into a joint and several bond, it becomes the separate debt of both, and therefore may be set off against either. Then, it has been objected that there is no mutuality in the debts: because, first, it is a joint debt, and, secondly, that the plaintiff should have a compensation from the other party. As to the first, it is sufficient to say that this is a *separate* as well as a *joint* debt, and therefore may be set off." BYLES, J., referred to *King v. Hoare*, 13 M. & W. 494,† where Parke, B. (p. 505), says: "The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that, if sued severally, and he does not plead in abatement, he is liable to pay the entire debt: but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee."]

CROWDER, J.—I am of opinion that there ought to be no rule in this *529] case. I cannot bring myself to *entertain the slightest doubt upon the subject. The action is brought against Wilkinson for a debt due from him to the plaintiff: and the simple question is, whether Wilkinson is entitled to claim a set-off against Owen, in respect of a joint and several promissory note of Owen and three other persons, as the several debt of Owen. It seems to be clear that Wilkinson might have sued Owen separately upon the note. Why, then, should he not have a right to set it off in an action brought against him by Owen? There is no pretence for the objection.

BYLES, J.—I am entirely of the same opinion. If we were to grant a rule in this case, we should be suggesting a doubt upon a matter which has hitherto been free from doubt.

WILLES, J.—I am glad the rest of the court concur in the opinion I expressed at the trial. I reserved the point, not because I entertained the least doubt about it, but because I was told that there was no decision upon it. That, however, turns out to be an erroneous suggestion.

Rule refused.

*530] *HASELER v. LEMOYNE and Another. Nov. 5.

A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorize him to seize, unless he ratifies the broker's act, with knowledge of what he has done; but he is responsible for any irregularity by the broker in dealing with the distress which he was authorized to make,—as, for selling the goods without notice of the distress, and without appraisement.

A., who received the rents and generally managed the property of B., in B.'s name, but without authority from her, signed a warrant to distrain the goods of C., a tenant, for rent in arrear, and, after the goods had been distrained, informed B. thereof, who thereupon said that she should leave the matter in his hands:—Held, sufficient evidence that the distress was authorized or ratified and adopted by B.

THE first count of the declaration charged the defendants with distraining and selling the plaintiff's goods for arrears of rent due to the defendant Lydia Catherine Lemoyne, without giving him notice of the

distress; the second was for selling the distress without appraisement; and the third for converting the plaintiff's goods.

The defendants pleaded not guilty "by statute," the statute mentioned in the margin being the 11 G. 2, c. 19, ss. 20, 21.

The cause was tried before Cockburn, C. J., at the sittings at Westminster after last Trinity Term. The facts were as follows:—The defendant Miss Lemoyne was the owner of a house and premises in Alfred Road, Harrow Road, which was in the occupation of the plaintiff as tenant at the rent of 2*l.* 12*s.* per month. On the 25th of January, 1858, there being a sum of 17*l.* due from the plaintiff to Miss Lemoyne in respect of this rent, one Alexander, who had been in the habit of receiving the rents and generally managing Miss Lemoyne's property, signed a warrant in Miss Lemoyne's name, but without any express authority from her, and employed the other defendant, Norden, a broker, to distrain the plaintiff's goods. Norden accordingly went upon the premises and made a levy, but he omitted to give the plaintiff notice of the distress, and also omitted to employ another appraiser to value the goods. On the 20th of February, the plaintiff's attorney wrote to Miss Lemoyne, complaining of these irregularities. Miss Lemoyne thereupon sent for Alexander, and, upon being informed by him that the goods had been distrained, and that they were about to be *sold, she [*531 said she would leave the matter in his hands. The goods were sold on the 26th of February.

On the part of the defendant Miss Lemoyne, it was submitted that she was not responsible for the irregularities committed by the broker, even if the warrant had been signed by her authority.

A verdict was taken for the plaintiff against both defendants (damages 8*l.* 2*s.* 2*d.*), under his lordship's direction; leave being reserved to enter a verdict for the defendant Miss Lemoyne, if the court should think that the evidence did not fix her.

F. Russell now moved accordingly.—There was no evidence that Miss Lemoyne authorized anything that was done by Norden. The warrant was signed without her sanction. [COCKBURN, C. J.—There was evidence of a complete recognition by her of everything that was done by Alexander.] If Alexander himself had been the landlord, he would not have been responsible for the illegal acts of the broker. The authority given to the broker, is, to take the necessary *legal* steps to distrain, appraise, and sell, not to sell the distress illegally and without appraisement. In *Lewis v. Read*, 13 M. & W. 834,† the landlord authorized bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person (supposing them to be the tenant's) beyond the boundary of the farm. The cattle were sold, and the landlord received the proceeds: and it was held that the landlord was not liable in trover for the value of the cattle, unless it were found by the jury that he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts. Parke, B., there said: "There *is no doubt that the acts of the defendant Read, in [*532 directing, through his agent Owens, the sale of the sheep, and receiving the proceeds, were a sufficient ratification of the act of the bailiffs in making the distress, as to such of the sheep as were taken on

the Penybryn sheep-walk, because the taking of them was within the original authority given to the bailiffs by Owens as the agent of Read. But, as to the others, which were not proved to have been taken on Penybryn, and as to which, therefore, the authority was not followed, Mr. Read could not be liable in trover, unless he ratified the act of the bailiffs, with knowledge that they took the sheep elsewhere than on Penybryn; or unless he meant to take upon himself, without inquiry, the risk of any irregularity which they might have committed, and to adopt all their acts." [BYLES, J.—The authority there was, to distrain on Whiteacre, and the brokers distrain on Blackacre. COCKBURN, C. J.—If your doctrine be true, the landlord never could be liable. Was there not enough here to show that the landlady took upon herself, without inquiry, the risk of any irregularity the broker might commit? CROWDER, J.—In *Gauntlett v. King*, 3 C. B. N. S. 59 (E. C. L. R. vol. 91), A. authorized B., a broker, to distrain for rent due to him from C. B., having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory: and it was held that A. was liable, jointly with B., in trespass. I thought it was one of the first principles, that, if one employs another to do a certain thing, he is liable for all the acts of irregularity committed by that other in doing it.] That is contrary to the doctrine laid down by the Court of Queen's Bench in *Freeman v. Rosher*, 13 Q. B. 780 (E. C. L. R. vol. 66), that a principal is not liable in trespass for the act of his agent, unless he authorized *it beforehand, or sub-
*533] sequently assented to it, with knowledge of what had been done. Thus, where, in an action of trespass against a landlord, it appeared that he gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture, and paid the proceeds to the defendant, who received them without inquiry, but without knowledge that anything irregular had been done,—it was held, that no such authority or assent appeared as would sustain the action. Patteson, J., in delivering judgment, says: "It is clear that a principal is not responsible for a trespass by an agent, unless he gave a prior authority or subsequent assent. Here, the warrant was the only prior authority, and clearly did not extend to destroying a building or removing a fixture. The chief reliance was therefore placed on the receipt of the money as proof of a subsequent assent: but, as the defendant had no knowledge that a trespass had been committed, and received it in the belief that his warrant had been lawfully executed, the receipt under such circumstances is no evidence of assent." [WILLIAMS, J.—In that case, the authority given, was, to distrain "goods," and the broker distrained "fixtures." COCKBURN, C. J.—The point I meant to reserve, was, whether Miss Lemoine had sufficiently authorized the distress. Where a man authorizes another to do an act which involves certain things necessary to make it legal, he is bound to see that those things are properly done, otherwise he is responsible for the illegal acts of his agent.] In *Peachey v. Rowland*, 13 C. B. 182 (E. C. L. R. vol. 66), it is laid down, that, if one employs another to do an act which may be done in a lawful manner, and the latter in doing it unnecessarily commits a public nuisance, whereby injury results to a third person, the employer is not responsible. [COCKBURN, C. J.—The landlady authorizes the seizure of the tenant's

goods. She is entitled, under certain *conditions, to sell them. The very goods are sold which she authorized to be seized. She can only justify the sale by showing that the conditions which entitled her to sell have been fulfilled. The thing is as simple as possible, if you go back to first principles.] The power to sell the distress is only given by the statute 2 W. & M., sess. 1, c. 5, s. 2. The authority to the broker, is, to distrain, and to sell the distress in the manner pointed out by the law; that is, to sell after due notice and due appraisement. Then, assuming that Alexander would have been liable, if he had been the landlord, for the acts of Norden, is there no distinction between his case and that of Miss Lemoyne? [COCKBURN, C. J.—None that I can see.] She could not be said to have ratified the irregular acts complained of; for, at the time her assent to the distress was given, no irregularity had been committed. The sale took place afterwards.

COCKBURN, C. J.—I am of opinion that there ought to be no rule in this case. From the evidence of Alexander it appears, that, after the distress had been made, and the fact communicated to Miss Lemoyne, she said she would leave the matter in his (Alexander's) hands. From that moment the distress was authorized by her, and she became responsible for all that was done under her authority. As to whether a landlord is liable for irregularities committed by the broker in conducting the distress, for the reasons I threw out in the course of the argument, I am clearly of opinion that he is liable.

WILLIAMS, J.—I am quite of the same opinion. Not only do I feel satisfied that there is nothing in the point which has been pressed by the learned counsel with so much zeal, but I must say, that, during a *pretty considerable experience of actions of this sort, I never heard it doubted. It is quite consistent with the view we take, that the landlord is not liable for the acts of the bailiff in distraining upon premises other than the demised premises, or for seizing things not by law distrainable. But where, as here, he takes the goods which it was meant he should take, the landlord is liable for any irregularity committed by him in the conduct of the distress.

CROWDER, J.—I am of the same opinion. As to the point reserved, I understand it to be whether Miss Lemoyne was in the position of a landlady who had authorized a distress to be made. Looking at the evidence, it appears, that, after the goods had been distrained, Miss Lemoyne had notice of the fact, and she told Alexander (who signed the warrant for her) that she would leave the matter in his hands. It seems, therefore, that Alexander acted for her in the matter of the distress, and that she was dealt with as landlady. The other point is one that surprised me quite as much as it did my Brother Williams, viz. that a landlord who authorizes a distress is not responsible for any irregularity committed by the broker in conducting the sale. That which is complained of here, is, an irregularity on the part of the broker in doing what it was the very object of the warrant that he should do. The broker has omitted to do something which the law required him to do to make the distress valid. In doing what he did, the broker was the servant of the landlady, and she is answerable for the irregularity.

BYLES, J.—I am of the same opinion. Mr. *Russell* has failed to observe the distinction between matters done which are dehors the

*536] authority, such as, taking *fixtures, or seizing goods in a different place from that to which the warrant addresses itself, and the case of an irregularity committed by the broker while acting within his authority. I cannot say that I never heard the point suggested before; but I may say that I never heard it received with any favour.

Rule refused.

EDWARDS v. EDWARDS. Nov. 17.

Where a cause was referred by judge's order under the 3d section of the Common Law Procedure Act, 1854, to a county court judge.—Held, that the costs of the proceedings before him were taxable, not under the county court scale, but in the same manner as if the reference had been to a master or to an arbitrator chosen by the parties.

THIS cause was referred by order of a judge under the 3d section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to the judge of the county court of Liverpool. The action was upon a promissory note. A set-off having been pleaded, the plaintiff attended with his witnesses at the county court for the purpose of meeting it, when a compromise was agreed to, the defendant to pay the plaintiff 255*l.*, and costs as between attorney and client. The plaintiff's attorney afterwards sent in his bill to the defendant's attorney, claiming 14*l.* 14*s.* 11*d.* The defendant's attorney tendered 13*l.* 4*s.*, which the plaintiff's attorney declined to accept. A judge's order was obtained for taxation of the bill, at the instance of the defendant, and it was accordingly taxed by one of the masters of this court on the county court scale, and 11*l.* 3*s.* 9*d.* allowed. Among other items disallowed, was, the attorney's fee for attending on the reference, because the order of the judge for that purpose had not been obtained: see the scale, Pollock & Nicol's County Court Practice, p. 165; Scott's Costs, 2d edit. p. 403.

*537] *Brett*, on a former day in this term, obtained a rule nisi to review the taxation. He submitted that the reference to the judge under the 17 & 18 Vict. c. 125, s. 3, was not a proceeding in the county court, and therefore not within the 33d section of the county court act, 20 & 21 Vict. c. 108. He referred to *Warden v. Stone*, 7 Ellis & B. 603 (E. C. L. R. vol. 90), and *Wheatcroft v. Foster*, 27 Law J., Q. B. 277.

Edward James, Q. C., now showed cause.—The master was quite right in taxing the costs according to the county court scale. [WILLIAMS, J.—Surely the act of parliament, when it empowered the judges of the superior courts to appoint a judge of a county court to be the arbitrator, never meant to interfere with the ordinary jurisdiction of the court as to costs.] The act empowers the judge to select the county court judge in his character of judge, upon such terms as he may think reasonable. [WILLIAMS, J.—The words giving him a discretion as to the costs would apply equally whether the arbitrator was a barrister, an officer of the court, or a county court judge.] *Wheatcroft v. Foster*, 27 Law J. 277, is a distinct authority to show that the master here has exercised a sound discretion: it was there held, that, where a judge makes an order under the 26th section of the 19 & 20 Vict. c. 108, that a cause commenced in a superior court shall be tried in a county court,

and the order is silent as to what costs are to be allowed, the master of the superior court in his taxation may take the county court scale of costs as his guide, so far as regards that part of the proceedings which took place in the county court. Lord Campbell says: "The defendant is entitled to receive such costs as the law has provided for him. With respect to proceedings in county courts, he has a right to have his costs taxed on the scale provided in the county court. *It is allowed [*538 that the order was regularly made under section 26: either party might have applied to the judge to embody in that order terms that the costs should be taxed as in the superior court, for, no order is made till both parties have had an opportunity of being heard. The judge, therefore, must be taken to have supposed that justice would be done between the parties by costs being taxed upon the lower and humbler scale; and the master acted very properly in looking at the scale of costs which had been prepared for proceedings in the county court." And the other judges express themselves to the same effect. Is there then any substantial distinction between a reference of a cause for trial to the county court under the 19 & 20 Vict. c. 108, s. 26, and a reference to a county court judge under the 17 & 18 Vict. c. 125, s. 3? [WILLIAMS, J.—I think decidedly there is. In *Wheatcroft v. Foster*, the effect of the order was to make the cause for the purpose of trial a cause in the county court: whereas, the reference under the Common Law Procedure Act is a mere step in ascertaining the damages. I can see no difference whether the person appointed arbitrator is a county court judge or any one else.] The reference is not to A. B., but to the judge of the county court. [BYLES, J.—He is acting as an arbitrator in a proceeding in the superior court.] The scale made under the 33d section of the 19 & 20 Vict. c. 108 expressly provides for references. [CROWDER, J.—That scale applies to references in the county court.]

WILLIAMS, J.—I am of opinion that this rule should be made absolute. I do not at all mean to impugn the authority of the case of *Wheatcroft v. Foster*, 27 Law J., Q. B. 277. But that case only decides, that, where the trial is ordered to take place in the county court under the 26th section of the 19 & 20 Vict. c. 108, the *33d section has [*539 operation. This, however, is not a proceeding in the county court at all, but a proceeding in this court. A judge of this court has made an order under the compulsory clauses of the Common Law Procedure Act, 1854, appointing the judge of the county court arbitrator. There is no distinction in this respect between a county court judge or any other person who may be named as arbitrator. And there can be no different rule of taxation, whether the arbitrator appointed under the order be a county court judge, or a barrister, or a master.

CROWDER, J.—I entirely agree with my Brother Williams. The case of *Wheatcroft v. Foster* is clearly distinguishable from the present on the ground which he has stated. The three persons mentioned in the 3d section of the Common Law Procedure Act, 1854,—an arbitrator appointed by the parties, an officer of the court, or (in country causes) the judge of any county court,—are all precisely on the same footing. And it is obvious, that, when the judge, in exercise of the power given to him by that section, names the county court judge as the referee, he does not mean to take the case out of the jurisdiction of the superior

court. The proceeding, then, not being in the county court, the costs ought not to be taxed upon the county court scale.

BYLES, J.—I am of the same opinion. The 3d section of the 17 & 18 Vict. c. 125, provides that certain matters may be referred, *inter alios*, to the judge of any county court: and it goes on to enact that “the award or certificate of such referee shall be enforceable by the same process as the finding of a jury upon the matter referred.” Suppose a cause referred, after writ, to the judge of a county court, and *540] the county court judge gives *a certificate in favour of the plaintiff,—in which court is the judgment to be entered up or enforced? Clearly in this court. The cause was never removed out of this court, and consequently the costs must be taxed according to the practice of this court. Rule absolute.(a)

(a) The 5th section of the 21 & 22 Vict. c. 74, repeals so much of the 17 & 18 Vict. c. 125, as enables the superior courts, or a judge thereof, to refer any cause to the judge of any county court.

In re ANNA BOOTH and Others. Nov. 16.

The court will enlarge the time for returning a commission for taking the acknowledgment of a married woman abroad, under the 3 & 4 W. 4, c. 74, where, by reason of the remoteness of the residences of the parties, the time allowed has proved too short.

A commission was directed to “William Bates, lawyer, John *Howey*, wholesale grocer, and Alexander Cummins, wholesale grocer, all of Dubuque, in the state of Iowa, in the United States of America.” The certificate of acknowledgment was signed by “Andrew Cummins and John *Hoey*.” The affidavit of verification was made by *Hoey*, who described himself as one of the commissioners, and stated that the certificate was signed by Andrew Cummins, “the other commissioner.” An affidavit was produced, made by the solicitor who prepared and sent out the commission, who stated that “he verily believed that the said Andrew Cummins and John *Hoey* who signed the certificate of acknowledgment, and the said John *Hoey* who made the affidavit of the due taking thereof, were the persons to whom the commission was intended to be directed:”—

The court refused to allow the documents to be received and filed without a further affidavit by some person acquainted with the place, who could more clearly identify the parties for those intended.

It is no objection that the notarial certificate is on paper instead of parchment.

There being sufficient upon the documents reasonably to satisfy the court that the commission had been bona fide executed,—the court permitted them to be received, though the notarial certificate did not in terms verify the signature of the justice of the peace before whom the affidavit of verification purported to be sworn.

ON the 21st of December, 1857, three commissions were sent out to the United States of America to take the acknowledgments of Mrs. Anna Booth, Mrs. Elizabeth Cock, and Mrs. Charlotte Foster. under the statute 3 & 4 W. 4, c. 74. The commissions were returnable on or before the 1st of October, 1858; but they were not in fact returned until the 29th of October.

Kinglake, Serjt., moved to enlarge the time for the return of the commissions, and that the registrar might be directed to receive and file the certificates of acknowledgment. The delay in returning the commissions was accounted for by the fact that Mrs. Booth, Mrs. Cock, and Mrs. Foster, the parties whose acknowledgments were to be taken, and who were all parties to the same conveyance, resided about fifteen hundred miles apart. The learned Serjeant submitted, upon the authority

of *In re Darling*, 2 C. B. 347 (E. C. L. R. vol. 52), that *the excuse was amply sufficient to warrant the court in enlarging the [541 time for the return.

The above objection was common to the three cases: there was also an objection peculiar to each case,—

In re Anna Booth.

The commission was addressed to William Bates, lawyer, John *Howey*, wholesale grocer, and *Alexander Cummins*, wholesale grocer, all of Dubuque, in the state of Iowa, in the United States of America. The certificate of acknowledgment was signed by *Andrew Cummins* and John *Hoey*. The affidavit verifying the certificate of acknowledgment was made by "John Hoey," who described himself as one of the commissioners, and stated that the certificate was signed by *Andrew Cummins*; "the other commissioner."

There was an affidavit explaining how this mistake arose. This was made by the solicitor who prepared and sent out the commission. It appeared that Thomas Porch, the brother of Anna Booth, from whom the deponent received his instructions, gave him the names of the commissioners as they were stated in the commission; that the deponent had since received a letter from Thomas Porch, in which he spelt the name of John Howey as "Hoey:" and the affidavit went on to say, "that, on the 29th of October, 1858, the deponent received the said documents from America, and it appeared that the acknowledgment of the said Anna Booth had been taken by John *Hoey* and *Andrew Cummins*, and the deponent had no doubt, and he verily believed the same to be true, that the said *Thomas Porch, in furnishing the names of Hoey [542 and Cummins to be commissioners, inadvertently spelt the sur-name of the former inaccurately, and by mistake called the latter 'Alexander' instead of 'Andrew'; that the said documents were sent out to the said Thomas Porch, and he attended to the matter, and the deponent believed the said Andrew Cummins and John Hoey who signed the certificate of acknowledgment by the said Anna Booth, and the said John Hoey who made the affidavit of the due taking thereof, were the persons to whom the said commission was intended to be directed; and that, in consequence of the distance the parties resided apart, and of the said Robert Porch having hesitated to execute the conveyance, more time was occupied in completing the acknowledgment than was expected."

Kinglake, Serjt.—The affidavit, it is submitted, sufficiently explains how the mistake originated, and shows with reasonable certainty that the persons before whom the acknowledgment was taken were the persons to whom the commission was intended to be directed. The case of *In re Bingle*, 15 C. B. 449 (E. C. L. R. vol. 80), is an authority to show that the court will receive explanatory affidavits in such cases. In a case of *In re Price*, 17 C. B. 708 (E. C. L. R. vol. 84), a similar mistake to this was allowed to be cured by affidavit. There, a commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to commissioners, one of whom was described as "*Edward C. Jones*," a collector and magistrate at that place. The acknowledgment was duly taken by Mr. Jones and one of the other commissioners; but Jones signed the certificate and affidavit

of verification "*Edmund C. Jones.*" The court allowed the documents to be received and filed, upon the production of affidavits showing that *543] *Edmund C. Jones* was the person to whom the commission was intended to go, that he had always been described in the register at the India House as "*Edward C. Jones,*" and that there was no other collector of that name in the company's service. (a) [CROWDER, J.—To be quite consistent with the case of *In re Price*, there should be something here to identify the persons who took the acknowledgment with the persons named in the commission. There is nothing to identify them, except the belief of the attorney. WILLIAMS, J.—We should have an affidavit of some person acquainted with the place, that there are no others of the name there. CROWDER, J.—It is quite consistent with this affidavit that there may be another person of the name of Cummins at Dubuque, whose Christian name is Alexander.] The question is, whether there is not upon the affidavit now before the court enough to satisfy them beyond all reasonable doubt that this commission has been executed before the proper persons.

In re Elizabeth Cook.

The additional objection in this case, was, that the notarial certificate was on paper instead of on parchment.

Kinglake, Serjt.—There was an old rule of Hilary Term, 14 G. 3, applicable to recoveries, which required all the proceedings to be on parchment. But that has long been departed from in cases under the 3 & 4 W. 4, *c. 74. It was so done, and allowed, in *Ex parte Carr*, *544] 5 C. B. 496 (E. C. L. R. vol. 57), in the case of an acknowledgment to bar dower. *Wilde*, C. J., there says: "The record of the transaction is the certificate of the acknowledgment, and that is upon parchment. The affidavit of the due taking of the acknowledgment, and the notarial certificate, are required by the court, to satisfy them that the acknowledgment has been duly taken. The affidavit being no part of the record, I do not see why it may not be upon paper. This being merely an acknowledgment taken to bar the party's right to dower, the reason for requiring parchment to be used does not apply, even if it were necessary in the case of an acknowledgment for the purpose of passing the fee." Mr. Serjt. Manning, in a note to *In re Lætitia Milard*, 5 C. B. 753 (E. C. L. R. vol. 57), shows that the ground of the decision in the case last cited applies in the case of an acknowledgment for the purpose of passing the fee.

In re Charlotte Foster.

The further objection in this case, was, that the notarial certificate did not in terms verify the signature of the justice of the peace before whom the affidavit was sworn. The affidavit purported to be sworn before "*William Adams Tozer, justice of the peace.*" The certificate was as follows:—"I, Samuel Walter Dickenson, a notary public, &c.,

(a) See *Ex parte Mann*, 7 Scott 142, 5 N. C. 226 (E. C. L. R. vol. 35). A commission for taking the acknowledgment of a married woman was addressed to "*Judge M'Roberts and W. Pythian; Illinois, in the United States,*" and was returned certified by "*W. Pythian and Samuel M'Roberts;*" the court required an affidavit showing the identity of *Judge M'Roberts* and *Samuel M'Roberts*.

do hereby certify that the foregoing affidavit by, &c., made before William Adams Tozer, who is an acting justice of the peace of, &c., was made in my presence this 4th day of October, 1858."

Kinglake, Serjt.—All that the court requires, is, to be satisfied that the affidavit is sworn before the person before whom it is represented to have been sworn, and that he was a person duly authorized to take the affidavit. *In re Partridge, 17 C. B. 18 (E. C. L. R. vol. 84), [*545 is a much stronger case than this. There, the court allowed the certificate of an acknowledgment of a deed by a married woman, taken at Chippewa, in Upper Canada, under the 3 & 4 W. 4, c. 74, to be received and filed, although the affidavit of verification omitted to state the place where the acknowledgment was taken,—there being sufficient on the face of the documents to satisfy them that the commission had been bonâ fide executed beyond the seas.

WILLIAMS, J.—With regard to the cases of Elizabeth Cock and Charlotte Foster, I think the documents may be received: but, as to the case of Anna Booth, I think, for the reasons already stated by my learned Brothers and myself in the course of the argument, the objection cannot be got over.

CROWDER, J., and BYLES, J., concurring, Rule accordingly.(a)

(a) The required affidavit was afterwards (in Hilary Term, 1859) produced, and the rule granted as to Mrs. Booth's acknowledgment also.

*LEADER v. HOMEWOOD. Nov. 2. [*546

An outgoing tenant has no right to enter for the purpose of severing and removing fixtures after the expiration of his term, and a new tenant has been let into possession. *Quære*, whether a tenant holding over at sufferance would be entitled to remove fixtures?

THIS was an action to recover the value of certain kitchen-ranges and other fixtures and effects, the first count of the declaration being for converting and the second for detaining them.

To the first count the defendant pleaded not guilty and not possessed, and to the second non detinet and not possessed; whereupon issue was joined.

The cause was tried before Byles, J., at the sittings in Middlesex after last Hilary Term, when the facts appeared to be as follows:—The plaintiff had for several years been tenant of premises situate in Mount Street, Lambeth, under a lease expiring at Michaelmas, 1857. In January, 1857, the plaintiff, who was desirous of renewing his term, entered into a negotiation with the landlord for that purpose. The negotiation, however, failed; and the landlord finally, by letter of the 17th of June, declined to grant the plaintiff a fresh lease. His term being ended, and the plaintiff at first declining to give up possession, he was on the 12th of October served with a demand under the 213th section of the Common Law Procedure Act, 1852, and on the following day he quitted, and was proceeding, with the landlord's consent, to remove his goods. Certain fixtures (some of which had been severed and others not) and other effects being still upon the premises, the plaintiff, on the evening of the 14th of October, went with a van for the purpose of taking them away, when he found the front door fastened. He then applied to

the defendant,—who had formerly rented a portion of the premises under him, and had on that day taken possession of the whole under an agreement for a lease from the superior landlord,—for leave to enter and *547] *take the goods. The defendant refused to allow him to do so, saying that if he attempted to enter he would give him into custody; and accordingly this action was brought.

On the part of the defendant, it was submitted, that neither trover nor detinue would lie under the circumstances; that neither would lie for fixtures not disannexed from the freehold (the presumption of law being, that, by leaving them on the premises at the expiration of his term, the tenant meant to abandon them to his landlord); that it lay on the plaintiff to show that the fixtures in question had been disannexed; and that no such evidence had been given: and, further, that there was no evidence that the defendant had been guilty of any conversion.

The learned judge left it to the jury to say,—first, whether the plaintiff had intentionally abandoned the fixtures in question,—secondly, whether the defendant converted them, intending to deprive the plaintiff of the possession of them.

The jury found that the plaintiff had not abandoned the goods, and that the defendant had been guilty of a conversion, and they returned a verdict for the plaintiff, damages 117*l.*, subject to be reduced upon a valuation; and leave was reserved to the defendant to move to enter a verdict for him, or a nonsuit, or to reduce the damages, if the court should be of opinion that the plaintiff was not entitled to recover in respect of the unsevered fixtures.

Wordsworth, Q. C., in Easter last, moved accordingly, and also for a new trial on the ground of misdirection.—He submitted that the plaintiff was under the circumstances perfectly justified in refusing to let the plaintiff in; that it was a presumption of law, that, if the tenant omits *548] to remove his fixtures during the term, he *means to abandon them to his landlord, and therefore that point ought not to have been left to the jury; that there was no evidence to show a conversion by the defendant; and that, if there was any conversion at all, it was on the part of the landlord, in letting the premises to a new tenant with the fixtures therein. He referred to *Lyde v. Russell*, 1 B. & Ad. 394 (E. C. L. R. vol. 20), *Minshall v. Lloyd*, 2 M. & W. 450,† *Wilde v. Waters*, 16 C. B. 637 (E. C. L. R. vol. 81), and to the notes to *Green v. Cole*, 2 Wms. Saund. 259*b, c.* [*WILLES*, J., referred to *Roffey v. Henderson*, 17 Q. B. 574 (E. C. L. R. vol. 79).]

COCKBURN, C. J.—We think it was properly left to the jury to say whether the defendant intended to exercise dominion over the goods, and we think the jury properly found that he had been guilty of a conversion. But, as to the fixtures, and as to the mode of leaving to the jury the question of abandonment to the landlord, we think there should be a rule.

Parry, Serjt., and *W. Pearce*, in Trinity Term, showed cause.—It is said, that, the plaintiff's term having expired, and he not having removed his fixtures before its expiration, they became the property of the landlord, and trover will not lie for them; and that the learned judge ought not to have left the question of intentional abandonment to the jury. The facts are shortly these:—The plaintiff had been

tenant of the whole premises under a lease which expired at Michaelmas, 1857. Part of the premises had been sublet by him to the defendant: and, when his term was about to expire, he entered into a negotiation for a renewal. This failed; and the landlord entered into an agreement with the defendant, under which the latter was to become tenant of the entire premises, his tenancy to commence from Michaelmas, 1857. The plaintiff not quitting when his term expired, the *landlord on the 12th of October gave him notice and served him with a demand of possession; and accordingly on that day [*549 he commenced removing his goods. On the 14th, the defendant obtained possession of the part of the premises which had been occupied by the plaintiff, and obstructed the latter in the removal of his goods, some of them consisting of fixtures, which were removable, but had not been actually severed from the freehold. [BYLES, J.—He began removing on the 10th, and continued on the 11th and 13th.] That the plaintiff had a right to remove these fixtures, is clear. The rule is thus laid down in the notes to *Elwes v. Mawe*, 3 East 38, in 2 Smith's Leading Cases, 4th edit. 153,—“In the very first case which established the tenant's right to remove fixtures under any circumstances, a limitation to the time during which that right endures was pointed out. That limitation shall exist, and was asserted in one of the latest cases on the subject,—*Lyde v. Russell*, 1 B. & Ad. 394 (E. C. L. R. vol. 20). The rule is, in the Year Book 20 H. 7, laid down in the following words:—‘*During his term*, he may remove them; but, if he suffer them to remain fixed *after the term*, they belong to the lessor:’ and the same rule with respect to time is laid down in *Poole's Case*, 1 Salk. 368, and several other cases: see *Ex parte Quincy*, 1 Atk. 477; *Dudley v. Warde*, Ambler 113; *Lee v. Risdon*, 7 Taunt. 188; *Buckland v. Butterfield*, 2 B. & B. 54 (E. C. L. R. vol. 6), 4 J. B. Moore 440 (E. C. L. R. vol. 16); *Colegrave v. Dias Santos*, 2 B. & C. 76 (E. C. L. R. vol. 9), 3 D. & R. 255 (E. C. L. R. vol. 16); *Lyde v. Russell*, 1 B. & Ad. 394 (E. C. L. R. vol. 20); *Weeton v. Woodcock*, 7 M. & W. 14; † *Roffey v. Henderson*, 17 Q. B. 574 (E. C. L. R. vol. 79); and the principal case. In *Penton v. Robart*, 2 East 88, this rule was somewhat enlarged; for, in that case, it was decided that a tenant who had remained in possession after the expiration of his term had a right to take away fixtures which he might have removed during his term. ‘He was, in fact,’ said Lord *Kenyon, ‘still in possession of the premises at the time when the things were taken away, and therefore there is no pre- [*550 tence to say that he had abandoned his right to them.’ These words, perhaps, cast some light on the principle which governs this subject. It will be remembered that the words of Lord Holt, in *Poole's Case*, are ‘*After the term, they become a gift in law to him in the reversion*, and are not removable.’ It would seem, therefore, that the landlord's right to them depends upon a presumption of law that the tenant, quitting the premises at the expiration of the term, and leaving the fixtures behind him, intended to bestow them on his landlord, to whom they become a gift in law: and this, like some other legal presumptions, is perhaps not capable of being rebutted: but *Penton v. Robart* may be thought to show that the presumption of gift arises, *not* immediately on the expiration of the term, but on the tenant's quitting the premises, leaving the fixtures behind him. The extension of the tenant's right

allowed in *Penton v. Robart*, is qualified by the expressions of the court in *Weeton v. Woodcock*. 'The rule,' says Alderson, B., delivering the judgment of the court in that case, 'to be collected from the several cases decided on this subject, seems to be this,—that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.'" [WILLIAMS, J.—I do not think the court in *Weeton v. Woodcock* meant to qualify *Penton v. Robart*; but to adopt the doctrine there laid down, and to apply it to the circumstances of the case before them. BYLES, J.—If *Weeton v. Woodcock* be law, it would show that the plaintiff's right to remove the fixtures in this case continued at all events until the 12th of October.] *551] He was exercising control over the goods down to the *moment of the act which the jury have found to be a conversion on the part of the defendant. [WILLIAMS, J.—Down to the time of *Penton v. Robart*, the tenant's right to remove fixtures was considered to be limited to his term. That case, however, and *Weeton v. Woodcock*, extend it to "such further period of possession by him as he holds the premises under a right still to consider himself as tenant." That I take to be the present state of the law upon the subject.] By his not taking any steps to remove him on the expiration of the term, the tenant had a right to consider that the landlord intended to allow him time to take away his fixtures. The question underwent discussion in *Hallen v. Runder*, 1 C. M. & R. 266,† 3 Tyrwh. 959, *Davis v. Jones*, 2 B. & Ald. 165, *Elliott v. Bishop*, 10 Exch. 496,† and *Bishop v. Elliott*, 11 Exch. 113.†

Wordsworth, Q. C., and *Petersdorff*, Q. C., in support of the rule.—The defendant had no right to consider himself in possession as tenant after the 29th of September, 1857. He chooses to remain in after his term had expired; he cannot say he is there under any colour of right. The learned judge ought not to have left the question of abandonment to the jury: he should have told them that the law presumed abandonment from the fact of the fixtures being suffered to remain upon the premises after the expiration of the term, unless there was evidence to rebut that presumption. The rule as laid down in the notes to *Greene v. Cole*, 2 Wms. Saund. 259 c, is as follows:—"Wherever things annexed to the freehold are removable, in favour of trade or otherwise, they must be severed during the possession of the party entitled; which severance may be made even after the expiration of his interest, if he have not quitted possession: *Penton v. Robart*, 2 East 68. But, if he quit the *552] premises, leaving the fixtures *annexed to the freehold, he cannot recover their value in trover, which lies only for goods and chattels: *Horn v. Baker*, 9 East 215; *Davis v. Jones*, 2 B. & Ald. 165; *Colgrave v. Dias Santos*, 2 B. & C. 76 (E. C. L. R. vol. 9), 3 D. & R. 255 (E. C. L. R. vol. 16),—in which last-mentioned case, *Abbott*, C. J., cites the words of *Gibbs*, C. J., in *Lee v. Risdon*, 7 Taunt. 188 (E. C. L. R. vol. 2), 2 Marsh. 495 (E. C. L. R. vol. 4), 'Unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of, that trover could be afterwards brought.' The rule to be collected from these and subsequent cases decided on this subject, seems to be, that the tenant's right to remove fixtures continues during his original term, and during such

further period of possession by him as he holds the premises under a right still to consider himself as tenant: *Lyde v. Russell*, 1 B. & Ad. 394 (E. C. L. R. vol. 20); *Minshall v. Lloyd*, 2 M. & W. 450; † *Mackintosh v. Trotter*, 3 M. & W. 186; † per Parke, B., in *Weeton v. Woodcock*, 7 M. & W. 14." † All the authorities show that the party must be in possession *under a right still to consider himself as tenant*. In *Mackintosh v. Trotter*, 3 M. & W. 184, † Parke, B., says: "The tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as *an excrescence on the term*." And in *Roffey v. Henderson*, 17 Q. B. 574, 586 (E. C. L. R. vol. 79), Patteson, J., says: "The general principle is, that, where the articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenants' fixtures, may remove them during the term, or during such time as he may hold possession after the term *in the capacity of a tenant*." [WILLIAMS, J.—That is not inconsistent with a tenancy on sufferance.] This plaintiff was not even a tenant on sufferance. The defendant had been let into possession by the landlord.

Cur. adv. vult.

*WILLES, J., now delivered the judgment of the court:—

This case was argued before the Lord Chief Justice, and my Brothers Williams and Byles. I was present during a part only of the argument, and therefore take no part in this judgment. [*553]

The court are of opinion that this rule ought to be made absolute, to reduce the damages by the amount applicable to the fixtures.

The law as to the limit of time within which a tenant is allowed to sever from the freehold the fixtures which are usually called "tenants' fixtures," is by no means clearly settled. According to the older authorities, the rule was, that he must sever them during the term. But, in *Penton v. Robart*, 2 East 88, it appears to have been considered that the severance might be made even after the expiration of the tenant's interest, if he has not quitted possession. However, in *Weeton v. Woodcock*, 7 M. & W. 14, † the rule was laid down that the tenant's right continues only during his original term, and "such further period of possession by him as he holds the premises under a right still to consider himself as tenant." It is, perhaps, not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance; in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz. that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures; and that, consequently, the verdict of the jury, which has negatived any such intention, is conclusive in his favour. And it is unnecessary to consider the *import of the rule with reference [*554] to the right of a tenant at sufferance during the continuance of such tenancy; because the landlord, in the present case, had re-entered and thereby put an end to the tenancy, before the plaintiff attempted to enforce his right. He cannot, therefore, sustain any claim for damages in respect of the defendant's having prevented him from severing the fixtures; for, at that time, the plaintiff had ceased to be a tenant of

any kind, or to hold the premises under any right to consider himself as such. Rule absolute accordingly.

See *Stansfeld v. Mayor of Portsmouth*, 4 C. B. N. S. 120 (E. C. L. R. vol. 93), and American note.

SIMMONS v. HESELTINE. Dec. 8.

Where the ability of the vendor to make a good title to a portion of the premises sold depends on a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor and purchaser.

Where, therefore, A. bought certain premises the description of which in the particulars included a stall, which was claimed by the purchaser of the adjoining house under the same vendor, and it was doubtful as a matter of fact whether the description had been corrected at the time of the sale to A. so as to exclude the stall, and as a matter of law whether the stall was included in the conveyance to the purchaser of the adjoining premises, and a court of equity had refused to decree specific performance against A. :—Held, that A. was entitled to recover back his deposit and interest, and the expenses of investigating the title, in an action against the vendor.

THIS was an action brought by the purchaser of a house in Queen Street, Hoxton, in the county of Middlesex, against the vendor, to recover the deposit-money and interest, together with the expenses of investigating the title, on the ground that the vendor had failed to make a good title to a portion of the premises comprised in the contract of sale.

The declaration contained counts for money received by the defendant to the use of the plaintiff, and for money found due from the defendant to the plaintiff upon accounts stated between them. There was also *555] a special count, stating that, theretofore, to wit, on the 8th of April, 1856, the defendant put up for sale certain tenements, described by him as a freehold estate, comprising a dwelling-house and shop, No. 1, Queen Street, Hoxton, with enclosed stall adjoining, fronting both Queen Street and Pitfield Street, under and subject to certain conditions, that is to say, &c. (setting them out); that the plaintiff became the highest bidder for and purchaser of the said tenement at and for a certain sum of money, to wit, 600*l.*, under and according to the said conditions; and that the plaintiff and defendant then agreed that the defendant should sell and the plaintiff should purchase the said tenements, at and for the said price, under and according to the said conditions, and that each of them should perform all things in the said conditions contained on his part to be performed: Averment of performance by the plaintiff of all things necessary on his part to entitle him to have a good title to sell and convey the said tenements made out to him by the defendant according to the said conditions, and that a reasonable time for the defendant to make out and have such title, had elapsed: Breach, that the defendant did not make out or have such title, but therein wholly failed and made default, whereby divers costs and expenses incurred by the plaintiff in investigating the title of the defendant, and in preparing to complete the said purchase on his part, became and were wholly lost to him, and he was deprived of the interest which he might and otherwise would have made of the deposit paid by him, according to the said conditions, and of the residue of the purchase-

money which he had prepared and kept ready to complete the said purchase, and was also put to and incurred the costs of defending a suit in Chancery instituted by the defendant against him to enforce specific performance of the said agreement, and was and is otherwise injured. Claim, 400*l*.

*The defendant pleaded, amongst other pleas,—first (to the common counts), never indebted,—secondly (to the residue of the [*556 declaration), that the defendant did, pursuant to the said contract, make out to the plaintiff, and had, such a title as was contemplated and provided for by the said conditions of sale,—thirdly, that the plaintiff, under and according to the third condition, waived certain objections to the defendant's title, and that the defendant did in all other respects, pursuant to the said contract, make out to the plaintiff, and had, a good title to sell and convey the said tenements,—fourthly, that the defendant did not agree as alleged. Issues thereon.

The cause was tried before Williams, J., at the first sitting in Middlesex in Easter Term last. The facts which appeared in evidence were as follows:—The house in question was No. 1, Queen Street, a street running at right angles with another street called Pitfield Street, the corner house of which last-mentioned street (No. 24) was partly in Queen Street and partly in Pitfield Street, but in front of that portion which faced Queen Street, there was an area or vacant space of the width of four feet two inches, running along that side of the premises, and lying between them and the foot-way of Queen Street. Upon this vacant space was a covered shed or stall.

The freehold of the premises No. 24, Pitfield Street, was put up for sale by the defendant at public auction, in September, 1854, when one Dr. Dawson became the purchaser.

The particulars of sale on that occasion described the property to be sold as “comprising a dwelling-house and shop, No. 24 Pitfield Street, let on lease to and in the occupation of Mr. William Dawson for a term of twenty-one years from the 25th of March, 1849, at the rent of 45*l*. per annum, the tenant paying all *rates and taxes, whether parliamentary or parochial, including the land-tax and sewers-rate [*557 (property-tax only excepted), also insuring the premises, and doing the repairs.”

In William Dawson's lease, the premises were described thus:—“All that piece or parcel of ground, with the messuage or tenement and buildings thereon erected and built, situate, lying, and being in Pitfield Street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, with the appurtenances, *and now in the possession of the said William Dawson*, and which said messuage or tenement is numbered 24, and the site of which said piece or parcel of ground and premises, with the several dimensions thereof, be the same more or less, and the abutments thereof, are described in the ground-plan of the same drawn in the margin of these presents.”

In the indenture whereby the premises so purchased by Dr. Dawson were conveyed to him and which indenture bore date the 17th of January, 1855, they were described as “all that piece or parcel of ground, with the messuage or tenement and buildings thereon erected and built, situate, lying, and being in Pitfield Street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, with the appurte-

nances, now or late in the occupation of William Dawson, and which said message or tenement is numbered 24, and the site of which said piece or parcel of ground and premises, with the several dimensions thereof, be the same more or less, and the abutments thereof, are described in the ground-plan of the same drawn in the margin of these presents; together with all buildings and fixtures in and about the same now belonging to the said W. K. Heseltine; and also all ways, lights, sewers, watercourses, rights, privileges, easements, advantages, and *558] appurtenances whatsoever to the said hereditaments or *any part thereof appertaining, or with the same or any part thereof now or heretofore enjoyed, or reputed as part or member thereof, or as appurtenant thereto."

In the particulars of sale, the lot purchased by the plaintiff was described thus,—“A valuable freehold estate, comprising a dwelling-house and shop most advantageously situate, No. 1, Queen Street, Hoxton, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, with enclosed stall adjoining, fronting both Queen Street and Pitfield Street, in the occupation of and held by Mr. James Orton, brushmaker, together with the enclosed stall at side, under a lease, for the term of twenty-one years from Christmas, 1855, at the net rent of 45*l.* per annum, the lessee paying all rates and taxes, whether parliamentary or parochial, including the land-tax and sewers-rate (property-tax only excepted), and insuring the premises, and doing the repairs. The house is brick-built, with front composed over, slated and tiled roof, having a shop-frontage, with the enclosed stall, of together 39 feet, and contains, &c., &c. Note: the above premises have very recently undergone extensive repairs, and the enclosed stall, and the piece of land on which the same stands, are subject to the existing lights of the adjoining house, in the occupation of Mr. William Dawson.”

The ground-plans in the margin of William Dawson's lease, and in the conveyance to Dr. Dawson denoted the slip of land in question by dotted lines. This piece was not coloured, whilst the rest of the premises were. The stall was erected on the slip of land by the defendant in 1855,—after the date of the conveyance to Dr. Dawson. There was evidence of William Dawson having received 5*l.* a year rent for the use of the slip of land, before the shed was erected, from the occupier of the house No. 24, Pitfield Street.

*559] On the part of the purchaser, it was objected that *the enclosed stall, which formed part of the lot purchased by him, appeared to have been included in William Dawson's lease, and also in the conveyance made to Dr. Dawson in January, 1855: and Dr. Dawson having given the purchaser notice that he claimed the enclosed stall, the purchaser declined to accept the title.

A bill was thereupon filed against the purchaser (the now plaintiff) for a specific performance, and the matter was heard before Vice-Chancellor Kindersley on the 29th of January, 1858, when the bill was dismissed,—his Honour observing “that both plaintiff and defendant intended to do what was right, the one in filing the bill, and the other in resisting it. The only controversy was, as to whether the contract should embrace the piece of land in question; there being none as to the price or title. Dr. Dawson insisted that he was the owner of the land, and that the plaintiff had sold it to him, and, of course, if that

were so, whatever the intention of the parties might be, the defendant had a right to say that he ought not to complete the purchase. The rule applicable to such a case was this,—If a third person, a stranger, and no party to the suit, was claiming to be owner of the property in dispute, the court was under the necessity of considering whether there was reason for coming to the conclusion that such claim was shadowy and frivolous,—whether there was any reasonable doubt, or whether there was any ground to suppose that the claim might succeed. There was no question more difficult to answer than this,—what degree of doubt do you entertain? Is your mind free from doubt? Is it slight? Is it strong? and, if so, is it very strong? It was necessary, however, to ask that question in all these cases of doubtful title. This was not the ordinary case arising upon documents of the vendor; but of a third person setting up a title by reason of an act *which did not and could not appear upon the abstract of the plaintiff. In the ordinary course, he (the Vice-Chancellor) should go through all the details minutely, and examine all the circumstances, and upon those state what degree of doubt they created upon his mind: but, if he did so here, the effect would be, that an opinion would be expressed either favourable or unfavourable to Dr. Dawson's claim, which, as he was not before the court, could not bind him. The issue here was between the vendor and purchaser; but the real question involved an issue, and a very important one, between the vendor and Dr. Dawson, or, if the purchase was to be completed, between the purchaser and Dr. Dawson. Under all these circumstances, without expressing the least opinion that Dr. Dawson, if he brought an action of ejectment, would or would not succeed, the court ought not to compel the defendant to take this title, that is, in fact, to undertake a lawsuit. Even if the court thought the purchaser would succeed in a lawsuit, that would not be a reason. Unless, therefore, Dr. Dawson's claim was so shadowy and unsubstantial that it was impossible that he should succeed, could there be a decree for specific performance? It was impossible to say that there was not a reasonable doubt; and it would be a hardship upon the defendant to make him take this title. The bill, therefore, must be dismissed, but, in consideration of the nature of the case, no costs would be given."

Evidence was given on the part of the defendant, that, before the commencement of the sale at which Dr. Dawson bought, in September, 1854, it was publicly announced by the auctioneer that there had been a mistake made in the plan annexed to the printed particulars, and that the mistake was rectified by dotted lines made in the plan, which was exhibited to the company, and was again shown to the purchaser and *explained to him before his signature was taken by the auctioneer. This was altogether denied on the part of the plaintiff. [*561

The learned judge left it to the jury to say,—first, whether they believed that William Dawson, the tenant, was in possession of the piece of ground in question as tenant of the house No. 24, Pitfield Street, at the time of the granting of the lease to him on the 5th of May, 1849. The jury found that William Dawson was in possession of the piece of ground in question as tenant at that time.

He then left it to them to say whether William Dawson was in possession and occupation of the piece in question as tenant from the date

of that lease down to the 17th of January, 1855, the date of the conveyance to Dr. Dawson. The jury also found that in the affirmative.

The learned judge further left it to the jury to say whether that which had taken place at the sale of the property in September, 1854, had been correctly represented by the plaintiff's or by the defendant's witnesses. The jury found in favour of the plaintiff.

A verdict was thereupon taken for the plaintiff for 203*l.* 13*s.*—being 120*l.* the amount of the deposit, 12*l.* interest thereon, 48*l.* for interest on the balance of the purchase-money, and 23*l.* 13*s.* for the plaintiff's costs of investigating the title.

Lush, Q. C., in Easter Term, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, pursuant to leave reserved to him at the trial, on the grounds,—first, that, upon the true construction of the lease and conveyance (to Dr. Dawson), the stall in question did not pass,—secondly, that, pursuant to the third condition of sale, the objection *562] must be taken to have been *waived:(a) or to reduce the verdict by the sum of 48*l.*, the amount of interest on the unpaid purchase-money:(b) or for a new trial, on the ground that the verdict was against the evidence.

Edwin James, Q. C., Hawkins, and W. C. Harrison, in Michaelmas Term, showed cause.—Upon the true construction of those instruments, it is submitted that the slip of land in question passed by the lease to William Dawson of the 5th of May, 1849, and by the conveyance to Dr. Dawson of the 17th of January, 1855: and further, it is submitted that, if the words there used are not sufficient to pass it, a court of equity would, under the circumstances, reform Dr. Dawson's conveyance, so as to make it include it. There was ample evidence to show that the strip of land in question was reputed to be in the possession of William Dawson, under the lease granted to him on the 5th of May, 1849; and if so, it passed by the conveyance to Dr. Dawson of the 17th of January, 1855. But assuming that the words of the conveyance are not large enough to comprise the shed, *563] Dr. *Dawson may now go into a court of equity to get the conveyance reformed, so as to make it conformable with the description in the particulars under which he purchased the property. In *Llewellyn v. The Earl of Jersey*, 11 M. & W. 183,† a deed conveyed a piece of land, forming part of a close, by reference to a schedule annexed. The schedule described the land, in a column headed "No. on the plan of the Briton Ferry Estate," as "153 b;" in a second column, headed "Description of premises," as "a small piece marked on the plan;" in a third column, as being in the occupation of J. E.; and in a fourth, as "34 perches." At the time of the contract, a line was drawn upon the plan as the boundary line dividing the piece 153 b from the rest of the

(a) Nothing turned on this.

(b) He also sought to reduce the verdict by the 12*l.* interest on the deposit. But this the court refused, referring to *Hodges v. Lord Litchfield*, 1 Scott 443, 1 N. C. 492 (1. C. L. R. vol. 27), and *Sugdon on Vendors and Purchasers*, 11th edit. 809, where a distinction is taken between the case of an action against the vendor and against the auctioneer,—the former being liable for interest, but the latter not: see *Harrington v. Hoggart*, 1 B. & Ad. 577 (E. C. L. R. vol. 20).

See also *Sugdon's Vendors and Purchasers*, 13th edit. p. 302, where it is said that the purchaser, on failure of the vendor to make a good title, is "entitled to interest on his deposit; and, if the residue of the purchase-money has been lying ready without interest being made of it, he is entitled to interest on that,"—citing *Flureau v. Thornhill*, 2 Sir W. Bla. 1078, and *Hodges v. Lord Litchfield*.

close of which it formed a part. The plan was drawn to a scale, but, upon measurement of the land, was found incorrect; and 153 b contained, within the line so drawn, less than 34 perches according to the actual measurement on the plan, and 27 perches only according to the actual measurement of the land. It was held that the statement that the piece of land conveyed contained 34 perches, was merely falsa demonstratio, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan as measured by the scale. Where a title is so doubtful and obscure that a court of equity will not decree specific performance of the contract against the purchaser, the latter is entitled to recover back his deposit: *Jeakes v. White*, 6 Exch. 873.† The majority of the court,—Pollock, C. B., Alderson, B., and Platt, B.,—there say: “We think, that, where a question arises between parties who are about to enter into the relationship of vendor and vendee, as to the meaning of a good or sufficient title, there must be such a title as the Court of Chancery would adopt as a sufficient ground *for compelling specific performance; and that, by a stipulation for a good title, must be understood, not such a title as would support a verdict for the purchaser in an action of ejectment against a mere stranger, but such a one as would enable the purchaser to hold the property against any person who might probably challenge his right to it.” Here, the matter has already been disposed of by the decision of Vice-Chancellor Kindersley. It is said that the objection was waived, because it was not made within the time required by the conditions of sale. But this is an objection that could not appear upon the abstract: and the plaintiff could not waive an objection of the existence of which he could not have been aware: *Hobson v. Bell*, 2 Beavan 17, 24; *Blacklow v. Laws*, 2 Hare 40, 47. As to interest, the purchaser is clearly entitled to demand interest on the residue of the purchase-money which was lying idle, and of which fact the vendor had notice: *Sherry v. Oke*, 3 Dowl. P. C. 349. There is no pretence for saying that the verdict is against evidence. There was evidence on both sides; and the jury have thought fit to give credit to the plaintiff’s witnesses, and to disbelieve those called for the defendant.

Lush, Q. C., and *Joseph Brown*, in support of the rule, were desired in the first instance to confine themselves to the question whether Dr. Dawson would be entitled in equity to have his conveyance reformed for the purpose of letting in the disputed slip of land. A court of equity will never reform a deed where there is a conflict of testimony as to what the parties intended. To induce the court to act, there must be a mistake common to both. The rule is so distinctly laid down by the Master of the Rolls (Sir John Romilly) in *Murray v. Parker*, 19 Beavan 305, 308. “In matters of mistake,” says his Honor, “the court [*565] *undoubtedly has jurisdiction, and, though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed as executed is not according to the real agreement between the parties. In all cases, the real agreement must be established by evidence, whether parol or written: if there be no previous agreement in writing, parol evidence is admissible to show what the agreement really was; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to explain it, in the same manner as in other

cases where parol evidence is admitted to explain ambiguities in a written instrument. I agree, that, *to justify the court in reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties, and that the agreement has been carried into effect by the deed in a manner contrary to the intention of both.*" [WILLIAMS, J.—I doubt whether this case falls within that class of cases. The buyer insists, that, by the contract which he entered into, the piece of land in question passed in equity, but the formal conveyance fails to carry that contract into effect. BYLES, J.—The question is, did the equitable interest in this piece of land pass by the contract of sale?] A court of equity will inquire into all the circumstances. [WILLIAMS, J.—There is no evidence as to what passed between the parties during the interval that elapsed between the sale and the conveyance.] The issue here is, did the vendor deduce a good title or not. Assuming the existing state of things to continue, the vendor *has* deduced a good title, equitable as well as legal. [COCKBURN, C. J.—Assuming that, to induce the court of equity to interfere, there must be a common mistake,—*566] where there is a contract in writing, you can only get rid of *the* effect of that by positive evidence that it does not represent the real contract between the parties.] It is at least ambiguous; and the court will not go into parol evidence. There is no doubt, that, when the particulars under which Dr. Dawson bought were framed, it was supposed that the piece of land in question was comprised in William Dawson's lease; and that the intention was to sell what was under lease to William Dawson. *Jeakes v. White*, 6 Exch. 873,† does not present the true test. The court of equity constantly evades it. In a bill for a specific performance, the issue is not whether the title is good or bad: it is enough, they say, if a third person sets up a claim which the court cannot see to be idle and frivolous. [WILLES, J.—Sir E. Sugden goes a very long way. He says,—Vendors and Purchasers, 11th edit. 505,—that, "to enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion; for, it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It hath, therefore, become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title; neither will he be forced to take an equitable title." COCKBURN, C. J.—The important question here is, whether Dr. Dawson would have a right to relief in equity.] We do not know the circumstances under which Dr. Dawson took the conveyance. [COCKBURN, C. J.—If the slip of ground in question was included in the description of the lot bought by Dr. Dawson, but is not included in the conveyance to him, there has been a clear mistake in carrying out the intention of the parties.] The court has not all the facts before it that a court of equity would have. *567] Besides, no equitable title will prevail against *a bonâ fide* purchaser for value without notice. In Story's Equity Jurisprudence, 6th edit., Vol. I., p. 194, § 165, it is said: "In all cases of mistake in written instruments, courts of equity will interfere only as between the original parties, or those claiming under them in privity, such as, personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment-creditors, or purchasers from them, with notice of the facts. As against *bonâ fide* purchasers for a valuable

consideration without notice, courts of equity will grant no relief, because they have at least an equal equity to the protection of the court." The contract here is ambiguous; and it is open to explanation by parol evidence. Then, the conduct of Dr. Dawson, and his delay in asserting his claim, if he had it, estop him from seeking any remedy in equity. The question is, not whether the title is such as a court of equity would compel an unwilling purchaser to take, but simply whether the defendant has or has not a legal title to convey. That was distinctly laid down by this court in *Boyman v. Gutch*, 7 Bingh. 379 (E. C. R. L. vol. 20), 5 M. & P. 222, where Tindal, C. J., in delivering the judgment of the court, says,—“Whether a court of equity would compel a purchaser to accept such a title, is a question which we are not called upon to determine. All that we profess to determine, is, the legal construction of the deed, which appears to us to negative the allegation above set forth in the declaration,”—that, at the time of the exposure of the property to sale, the defendant had not a good right or title to sell or assign, &c. That is controverted only by the case of *Jeakes v. White*, 6 Exch. 873:† but, in that case, Martin, B., differed from the rest of the court, and the case of *Boyman v. Gutch* was not referred to either during the argument or by the court in giving judgment.

**Harrison* afterwards referred to the following authorities,—[*568 *Sugden's Vendors and Purchasers*, 10th edit., Vol. 2, p. 202, where the learned author lays down the rule thus: “After some difference of opinion, it appears to be settled as, no doubt, the rule should be, that, even in a court of law, equitable objections to a title may enable a purchaser to resist a contract, or to rescind it,”—a passage which the learned author repeats in the 11th edit., Vol. I, p. 532. *Hartley v. Pehull*, Peake's N. P. C. 131 (2d edit. 178), where it was held that a man is not obliged to accept a conveyance where the title is doubtful; Lord Kenyon saying,—“When a man buys any commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least in a court of law. No man is obliged to buy a lawsuit.” Lord St. Leonard's *Handy Book*, p. 32, where he speaks of oral corrections of the particulars at the time of sale. And *Sugden's Vendors and Purchasers*, 13th edit. 142, where it is said: “Equity corrects mistakes and fraudulent omissions in agreements in deeds; for, if a mistake appears, it is as much to be rectified as fraud; but the difficulty to establish it is great. Where it was clearly shown that a settlement was framed contrary to the intention, in consequence of a clerk mistaking the attorney's instructions, the court refused to rectify the settlement, as nothing appeared in writing under the hands of the parties to correct it by (*Harwood v. Wallace*, cited 2 Ves. Sen. 195; *Alexander v. Crosbie*, Lloyd & G., Cas. t. *Sugden* 150; *Rogers v. Earl*, 1 Dick. 294). But, whatever difficulty there may be of admitting parol evidence singly, it is always admitted where it is corroborated by other evidence. And, if necessary, an issue may be directed to try the fact.”

Cur. adv. vult.

**COCKBURN*, C. J., now delivered the judgment of the court.

This is an action brought by the purchaser against the vendor [*569 of a house, to recover the deposit-money and the expenses of investigating the title, on the ground that the defendant was unable to make a

good title to a portion of the premises comprised in the contract of sale, viz. a stall adjoining and described as a part of the house.

The objection to the title was, that the stall had been previously sold to a Dr. Dawson as part of the adjacent house, and had been conveyed to him. A bill in equity for a specific performance had been filed by the present defendant, and dismissed by Vice-Chancellor Kindersley, on the ground that Dr. Dawson had given notice to the defendant in equity (the present plaintiff) of his claiming the stall as part of the house already sold and conveyed to him; and his Honour considered, on perusing the conveyance, that there was reasonable doubt whether the stall did not pass thereby. It was therefore contended, that, according to *Jeakes v. White*, 6 Exch. 673,† the plaintiff was entitled to treat the title as defective, and maintain this action. In that case it was held by the Court of Exchequer (Martin, B., dissentiente), in an action of the same kind as the present, that, where a question arises between parties about to enter into the relation of vendor and purchaser, as to the meaning of a good or sufficient title, there must be such a title as a court of equity would adopt as a sufficient ground for compelling a specific performance.

It does not appear, however, that *Boyman v. Gutch*, 7 Bing. 379 (E. C. L. R. vol. 20), 5 M. & P. 222, was cited by either the counsel or the court. In that case, this court held, that, in such an action, the *570] court ought not to consider *whether the title was of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply to determine whether the vendor had a good title or not.

The point in *Boyman v. Gutch* on which the ability of the vendor to make a good title depended, arose on the construction of a deed; and, if we were to be guided by that case, and were to decide the present simply with reference to the construction to be put on the terms of the actual conveyance to Dr. Dawson, we should decide in favour of the defendant, and make the rule absolute to enter a nonsuit; for, although we agree with the Vice-Chancellor that a doubt may well be entertained on the point, yet, if we are to express our opinion, it is that the stall did not pass by that conveyance.

A further question, however, was raised at the trial. It appeared that the printed particulars of sale by auction under which Dr. Dawson purchased his house, and which were duly signed on behalf of the vendor and purchaser, described that house in such a way as to leave no doubt that the stall was to form part of it. And, if this had been merely so, we apprehend that a court of equity would certainly reform the conveyance so as to make it duly effectuate the contract of sale; and that, consequently, there would be a fatal impediment to the defendant's making a good title to convey it to a subsequent purchaser.

But, at the trial, it was asserted, on behalf of the defendant, that, before the sale by auction began at which Dr. Dawson bought, it was publicly announced in the sale-room by the auctioneer, that there had been a mistake made in the plan annexed to the printed particulars, and that it had been rectified by dotted lines made in the plan, which was exhibited to the company, and which was again shown to the *571] *purchaser, and explained to him before his signature was taken by the auctioneer. This was altogether denied on the part of

the plaintiff; and the case went on the most conflicting evidence to the jury, who chose to believe the witnesses for the plaintiff, and wholly to disbelieve those for the defendant, and to find as a fact that the alteration in the particulars of sale was not proclaimed at the auction, or in any way communicated to Dr. Dawson or his agent.

With respect to this finding, we were strongly urged to grant a new trial, on the ground that the verdict was unsatisfactory and against the weight of evidence; and, certainly, in an ordinary case, we should have felt inclined to submit this question of fact to another jury. But, in this case, we think we ought not to take such a course. The verdict already given at all events demonstrates that the ability of the defendant to make a good title to the stall depends on a doubtful question of fact as well as of law. In *Jeakes v. White*, 6 Exch. 873,† the question on which the title depended was a question of fact, viz. whether the person through whom the defendant claimed filled the character of heir-at-law to a former proprietor: and, without giving any opinion whether the test proposed by the Barons in that case ought to be adopted in all cases, we agree with them in thinking, that, where the title is dependent on a question of fact which it is impossible to regard as reasonably certain, such a title ought not to be deemed a good or sufficient title as between vendor and purchaser. If we should hold that a purchaser in such a case cannot treat the title as insufficient, and recover back his deposit-money, we should, in effect, put him to his election either to forfeit his deposit, or (as Lord Kenyon expressed it in *Hartley v. Pehall*, Peake's N. P. C. 178) to buy a lawsuit.

Supposing that a second jury in this case were to *find in favour of the defendant, yet their verdict would not bind Dr. Dawson, [*572 who might, perhaps, after the plaintiff had completed his purchase, file a bill against him, and in that suit establish as a fact, in accordance with the verdict already given, that the stall was included in the contract for the sale of the house between him (Dr. Dawson) and the defendant.

For these reasons, we think that we ought not to make the rule absolute either for entering a nonsuit or for a new trial.

Rule discharged.

See *Poppleton v. Buchanan*, 4 C. B. N. S. 20 (E. O. L. R. vol. 93), and American note.

END OF MICHAELMAS TERM.

*573] *IN THE EXCHEQUER CHAMBER.

MICHAELMAS VACATION, 1858.

TUFF v. WARMAN.

In an action to recover damages for an injury occasioned by a collision between two vessels,—

Held by the Exchequer Chamber, that the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened: in the first case, the plaintiff would be entitled to recover; in the latter not, as, but for his own fault, the misfortune could not have happened.

Mere negligence or want of ordinary care or caution, will not, however, disentitle the plaintiff to recover, unless it be such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.

The plaintiff's compliance with the regulations of the 17 & 18 Vict. c. 104, ss. 296, 298, as to porting his helm, &c., is not in such a case a condition precedent to his right to recover.

THIS was an appeal from a decision of the Court of Common Pleas discharging a rule for a new trial (moved on the ground of misdirection and that the verdict was against evidence) in an action against the defendant, a Trinity House Pilot, for negligently navigating a steam-vessel called the *Celt* in the river Thames, and running against and damaging the plaintiff's barge, the *Nancy*.

The cause was tried before Willes, J., at the sittings in London after Hilary Term, 1857, when a verdict was found for the plaintiff for 106*l.*, being the amount of the penalty of the bond given by the defendant and the sum payable to him for pilotage in respect of the voyage on which he was at the time engaged as pilot.

At the time the collision took place, the *Nancy* was sailing down the river with a fair wind; and the *Celt* was steaming up the river.

From the evidence of the plaintiff's witnesses, it appeared that there *574] were only two persons on board the **Nancy*, one of whom was occupied in washing the deck, and the other steering,—the latter being in such a position as not to be able to see ahead (the sail being in the way) without stooping, that he had seen the *Celt* when more than half a mile off, as he stated, on the south side of the river, and that when he so saw her there was no likelihood of her coming into collision with the barge; that he had not seen her again until just before the collision, when he said he ported his helm, but that it was then too late to alter the course of the barge. He stated, that, if he had seen the steamer a few minutes before, he should have ported his helm, but that he should not have avoided the collision by porting his helm five minutes before; and that there was plenty of room on each side for the steamer to pass.

Two seamen who were in another vessel were called by the plaintiff, and stated that the *Celt* was about the middle of the river, but nearer to the north than to the south shore; that the *Celt* and the *Nancy* were for a quarter of a mile or more before the collision in a direct line; that

the Celt did not port her helm; and that there was no difficulty in the steamer passing the Nancy on either side.

On the part of the defendant, witnesses were called to prove that the defendant was only one-fourth of the width of the river from the north bank of the river; that he was keeping a look-out, and that he could not see whether any one was looking out on the barge; that, several minutes before the collision, he directed the helm of the Celt to be ported, and that this direction was obeyed; that this was done in time to avoid the collision, had the Nancy at the same time ported her helm also, or if she had even kept on her course; but that her steersman had starboarded his helm instead of porting it.

A number of pilots were called for the purpose of *proving [*575 that the defendant acted properly under the circumstances of the case: and they stated that they thought it would be the duty of the defendant to port his helm: and two of them said that it was the duty of the defendant to port his helm, whatever the consequences might be.

In his summing-up the learned judge told the jury that the plaintiff was not entitled to recover if it was an accident, or if the plaintiff by his negligence had directly contributed to the accident; and that, if the injury was occasioned by the negligence of both parties, the plaintiff had no remedy: and he asked the jury whether they thought the absence of look-out was an act of negligence on the part of the plaintiff; and, if so, they would have to take it into consideration in deciding whether, notwithstanding that, the defendant was liable: and he further told them, that, if the parties on one vessel had a look-out, and still persisted in a course which would inflict an injury, then they were liable, though there was no look-out on the other vessel, for that would not be the direct cause of the injury: and he referred to the case of *Davies v Mann*, 10 M. & W. 546,† by way of illustration. The learned judge further told the jury, that, if they thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that, if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover.

In the following Easter Term, a rule was obtained on the part of the defendant calling upon the plaintiff to show cause why there should not be a new trial, on the ground that the learned judge had misdirected the jury, in this, that he ought to have told them, that, if the plaintiff by his negligence contributed to the *occasioning of the accident, he could not recover, whether he contributed directly or indirectly; [*576 and that, even assuming negligence on the defendant's part, the plaintiff could not recover, if he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence; and that he should further have told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover.

Cause was shown against this rule in Trinity Term, 1857, and the rule was discharged; but leave was given to the defendant to appeal, pursuant to the 35th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. Vide 2 C. B. N. S. 740 (E. C. L. R. vol. 89).

If the court should be of opinion that the objections made to the ruling of the learned judge are unsustainable, the judgment below is to stand: if not, the judgment below is to be reversed, and a new trial ordered.

The case was argued on the 10th of May, 1858, before Wightman, J., Erle, J., Crompton, J., Watson, B., Bramwell, B., and Channell B.

Collier, Q. C. (with whom was *Digby Seymour*), for the defendant. (a)—

*577] The 296th sect. of the Merchant *Shipping Act, 17 & 18 Vict. c.

104, enacts, that, "whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that, if both ships were to continue their respective courses, they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steam-ships and by all sailing ships whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command." The 297th section enacts, that "every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam-ship." And the 298th section enacts, that, "if, in any case of collision, it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals issued in pursuance of the powers hereinbefore contained (s. 295) or of the foregoing rule as to the passing of steam and sailing ships (s. 296) or of the foregoing rule as to a steam-ship keeping to that side of a narrow channel which lies on the starboard side (s. 297), the owner of the ship by which such rule has been infringed, shall

*578] not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary." It is clear from the evidence that the collision in this case was occasioned by the *Nancy's* men not seeing the position of the *Celt*, and not porting her helm until too late to avoid it. The plaintiff's own evidence shows that there was manifest negligence on his part. [WIGHTMAN, J.—The only question we have to consider, is, whether the summing-up was correct.] The learned judge should have told the jury, that, if the plaintiff by the exercise of ordinary care on his part could have avoided the collision, he was not entitled to recover, and that the evidence showed an entire absence of due care on his part. The law upon this subject was very much considered in *Butterfield v. Forrester*, 11 East 60; speaking of which case, Parke, B., in *Bridge v. The*

(a) The points marked for argument on the part of the defendant, were as follows:—

"That if the plaintiff's negligence contributed to the accident, whether he contributed directly or indirectly, the plaintiff was not entitled to recover: That, even assuming negligence on the defendant's part, the plaintiff was not entitled to recover, if by ordinary care he might have avoided the consequences of the defendant's negligence: That, if the accident arose directly or indirectly from the plaintiff's barge disobeying the statutory regulations, the plaintiff was not entitled to recover: And that the learned judge ought to have so directed the jury."

Grand Junction Railway Company, 3 M. & W. 244,† says,—“The law is laid down with perfect correctness in the case of *Butterfield v. Forrester*; and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong.” That was followed by *Davies v. Mann*, 10 M. & W. 546,† where the same learned judge says: “It appears to me that the correct rule concerning negligence is laid down in *Bridge v. The Grand Junction Railway Company*, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence.” That case (*Davies v. Mann*) is supportable on this ground, that, *although the plaintiff was guilty of negligence in tethering the [579 donkey and leaving it on the highway, he had no control over it at the time, so as to be able by the exercise of ordinary care to avoid the injury. This is not the case of a barge moored in the river, but of a vessel navigated by persons who may be presumed to know the statutory regulations, and of whom it may fairly be assumed that they will obey them. The rule of law is also affirmed in *Clayards v. Dethick*, 12 Q. B. 439 (E. C. L. R. vol. 64), where it was laid down, that, in an action for damage occasioned by the defendant's negligence, a material question is, whether or not the plaintiff might have escaped the damage by ordinary care on his own part: but the defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger: the amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury. That question was not at all submitted to the jury here. [WIGHTMAN, J.—The plaintiff may have been guilty of some negligence, and still it may not have contributed to the loss. It should have been left to the jury to say whether the plaintiff had been guilty of negligence; and that would in a great measure be determined by the consideration whether he could by the exercise of ordinary care have avoided the accident. [WIGHTMAN, J.—Even though it was impossible that that negligence could have contributed to the accident! WATSON, B.—The usual way of leaving such a question, I believe, has been,—Was the plaintiff guilty of negligence? and, did that negligence contribute to the injury complained of?] This is not a case of antecedent negligence on one side or the other, but of concurrent negligence on the part of both. The plaintiff was not entitled to recover, if he might by the exercise of ordinary care have avoided the collision. *The next question is, whether the learned [580 judge ought not to have told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover. The effect of the regulations was considered in *Dowell v. The General Stear. Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85), where it was held that a plaintiff cannot recover at law for mischief done to his ship by its being struck by the defendant's ship, in consequence of the latter being improperly managed,

if it appear that the plaintiff's ship was improperly managed, and that such improper management *directly* contributed in any degree to the accident, however much the defendant may also be in fault; though, if there be negligence on the part of the plaintiff only *remotely* connected with the accident, the question is whether the defendant by ordinary care and skill might have avoided the accident. So, in *Morrison v. The General Steam Navigation Company*, 8 Exch. 733,† it was held, that, where a vessel through sheer negligence injures another vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the Admiralty regulations, by not exhibiting a light, affords no justification under the act, where the absence of the light does not *in any way contribute* to the accident. In *Whittell v. Crawford*, 27 Law Times 223, 2 Jurist, N. S. 742 [37 Eng. L. & Eq. 466] Crowder, J., in his summing up, referred to the 14 & 15 Vict. c. 79, s. 28, and the Admiralty regulations, and told the jury, that, if they thought the collision was occasioned wholly or in part by the non-observance by the plaintiff's brig of the regulations as to placing a light at the mast-head, the defendant was entitled to a verdict: and the Exchequer Chamber held the ruling good. In *the case of *The Mangerton*, 2 Jurist, N. S. 620, Dr. Lushington lays it down that "both parties are bound to act on the presumption that the statute must and will be obeyed. The vessel approaching is justified in supposing that the other will obey the statute." So, in *Vennall v. Garner*, 1 C. & M. 21,† Bayley, B., says: "The rule is, that the plaintiff could not recover, if his ship were *in any degree* in fault in not endeavouring to prevent the collision. Here, the plaintiff had a right to presume that the defendant's ship would do what she ought to do." In this case, it was quite clear that the plaintiff kept no look-out, and that he was guilty of negligence: as to that there was no conflict of evidence. [WIGHTMAN, J.—We have nothing to do with the evidence. The question is, whether the direction of my Brother Willes was correct in point of law. The main objection here seems to be the use of the word "directly." If by the exercise of ordinary care the plaintiff might have prevented the injury, he contributes to it, and therefore cannot recover. CROMPTON, J.—The plaintiff cannot by his negligence cast upon the defendant the necessity of using extraordinary care. It is not enough to say that the defendant has been negligent: but it is no answer to say that the plaintiff has been negligent also, unless you go on to show, that, but for the plaintiff's negligence, the accident would not have happened, or might have been avoided.] Referring to the argument that the omission to exhibit a light, in obedience to the Admiralty regulations was the proximate cause of the collision, Lord Campbell, in *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85), says: "If it is a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. According to the rule which prevails in the Court of Admiralty, in a case of collision, if both vessels are in fault, *582] the loss is equally *divided: but, in a court of common law, the plaintiff has no remedy if his negligence *in any degree contributed* to the accident. In some cases, there may have been negligence on the part of a plaintiff *remotely* connected with the accident; and, in these cases, the question arises, whether the defendant by the exercise

of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey-case, *Davies v. Mann*. 10 M. & W. 546.† There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss." Upon the whole, it is submitted that the learned judge erred in omitting to draw the attention of the jury to that which all the authorities show to have been the main and substantial question between the parties, viz., whether the plaintiff by the exercise of ordinary care and diligence might have avoided the collision, and also in omitting to tell them, that, by his failure to observe the statutory regulations, he himself was contributory to the loss.

J. Wilde, Q. C. (with whom was *Honeyman*), contra. (a)—*The [*583 summing-up of the learned judge was perfectly unexceptionable. In substance, he tells the jury that the plaintiff is not entitled to recover if he by his negligence directly contributed to the accident, or if the injury was occasioned by the negligence of both,—that, if they thought the absence of look-out was an act of negligence on the part of the plaintiff, they must take that into consideration in deciding whether, notwithstanding that, the defendant was liable,—that, if the parties on one vessel had a look-out, and still persisted in a course which would inflict an injury, they were liable, though there was no look-out on the other vessel, for that (the want of look-out on the last-mentioned vessel) would not be the direct cause of the injury: and he concludes by saying that, if the jury thought the accident had been partly caused by the plaintiff's own negligence, they should find for the defendant; but that, if they thought the barge was injured by the negligence of the defendant, and that the negligence of the plaintiff did not directly contribute thereto, the plaintiff was entitled to recover. If there has been an antecedent act of negligence in the one party, the question arises whether the other might not by the exercise of ordinary care and skill have avoided the consequences. For instance, a man lies down to sleep on a highway: that is an antecedent act of negligence on his part; but it will not justify another in negligently driving over him. The real question in these cases is,—was the injury brought about by the *neg- [*584 ligence, direct or indirect, of the plaintiff? If it was, he is not entitled to recover. [WATSON, B.—The solution of that question must depend upon the view which the jury may take of the evidence. In *Morrison v. The General Steam Navigation Company*, 8 Exch. 733,† the Lord Chief Baron says: "The point I left to the jury involved the question whether he himself did not contribute to the accident by his

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

"That negligence on the part of a plaintiff does not disentitle him to recover, unless such negligence directly contributes to the accident: That, unless the negligence of the plaintiff occasions the accident, wholly or in part, it forms no answer to the plaintiff's claim: That the statute 17 & 18 Vict. c. 104, s. 298, introduced no change into the law, but was a mere parliamentary recognition of the common law rule: That the learned judge did substantially leave to the jury the question whether by the exercise of ordinary care the accident might have been avoided: And that, upon the proper construction of the statute, the plaintiff's compliance with the rule relative to porting his helm, was not a condition precedent to his right to recover."

own carelessness. We are clearly of opinion that no change in the law has been effected by this regulation of the Admiralty; but that persons in navigating their vessels are still bound to keep a look-out, just as they were before these regulations were made; and, if it could be clearly made out that a vessel having no light had been run down by another from sheer carelessness and negligence in not keeping a good look-out, we agree with Mr. Watson in thinking that in such a case the plaintiff would have had a right to compensation from the defendants." In *Whittel v. Crawford*, Coleridge, J., says: "The alleged ground of appeal is, misdirection of the judge; but his direction to the jury is in the very words of the statute. If they thought the collision was occasioned wholly or in part by non-observance by the plaintiff of the Admiralty regulations, that then the defendant was entitled to the verdict." That was the substance of the direction here. The jury were told that they must find for the defendant if they thought the accident was partly caused by the plaintiff's own negligence. The word "directly" was not used as contradistinguished from "indirectly." The jury had already been instructed as to the sense in which that expression was to be understood. [CROMPTON, J.—The word "contribute" is a very unsafe word to use: it is much too loose.]

*585] *Collier*, in reply.—From beginning to end, the *summing up of the learned judge was eminently calculated to divert the minds of the jury from the real question they were to consider.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the court:—

It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.

This appears to be the result deducible from the opinion of the judges in *Butterfield v. Forrester*, 11 East 60, *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 246,† *Davies v. Mann*, 10 M. & W. 548,† and *Dowell v. The General Steam Navigation Company*, 5 E. & B. 206 (E. C. L. R. vol. 85).

In the present case, the main objection taken to the summing up was, that the judge left to the jury whether the plaintiff by his negligence "directly" contributed to the misfortune; and it was contended, for *586] the defendant that, whether he directly or indirectly contributed, was immaterial, if he contributed to it by his negligence at all. But the direction to the jury must have reference to the evidence in the case; and taking the whole summing up together, in connection with the evidence, we do not think that the jury could have been

misled by the use of the word "directly." The learned judge told the jury that, if the absence of a look-out was negligence on the part of the plaintiff, still, if the defendant also had a look-out, and nevertheless persisted in a course that would inflict an injury, he would be liable, though the plaintiff had no look-out; for that neglect of the plaintiff would not be the direct cause of the injury, that is to say, would not be a cause without which the injury would not have happened.

In this, which seems to be the obvious sense in which the word "direct" was used, we do not think there was any misdirection; and, in other respects, the summing-up does not appear to be objectionable, according to the rules to be adduced from the authorities referred to.

Upon the whole, then, we are of opinion that the judgment should be affirmed. Judgment affirmed.

In *Button v. Hudson Railroad Co.*, 18 N. Y. 248, which was an action against a railroad company for an injury resulting in death, the evidence showed very gross negligence on the part of the deceased, and it was held to be error to charge, that in order to exempt the defendant from liability, the negligence of the deceased must have *directly* contributed to the injury, as it tended to mislead the jury under the circumstances. It was sufficient that the negligence of the deceased was the *proximate* cause of the injury. There was not, however, entire unanimity in the court in respect to the force of this distinction between the two phrases, and in the subsequent case of *Johnson v. Hudson River Railroad*, 20 N. Y. 74, which was similar in its general character to *Button v. Railroad Co.*, it was thrown overboard. The word "directly" was said not to be particularly significant; but as, in the particular case, no conceivable negligence could be imputed to the plaintiff which would operate remotely or collaterally, or otherwise than directly, if at all, the jury, in the opinion of the court, could not have been misled. The principal case of *Taff v. Warman*, in the Common Pleas, was cited as a controlling authority on the point. See also *Cleveland, &c., Railroad v. Terry*, 8 Ohio, N. S. 584.

The question as to how far a plain-

tiff is precluded by his own concurring negligence from recovering in an action for an injury occasioned by the negligence of another has been a good deal discussed of late years in the United States, but it cannot be said that the decisions are perfectly agreed as to what the rule should be. Perhaps, in view of the great variety and complexity of the circumstances to which it may be applied, no exactness of definition is possible. According to the weight of authority at the present time, however, the principle may be stated in general terms to be, that every one is bound to use ordinary care to avoid or prevent the occurrence of a probable injury to himself; and that, when the want of such care is in fact the proximate cause of the occurrence of the injury, he cannot recover, though but for the negligence of the other party the injury might not have happened. The use of the phraseology, "negligence which *directly* contributes to an injury," in this connection is certainly unsatisfactory, if not (as it seems from the principal case), exactly objectionable, since it is apt to convey to the minds of jurors the impression that a plaintiff will only be prevented from recovering where the injury is attributable to some *active* agency on his part, whereas the mere omission of a reasonable precaution would be often quite sufficient. The following are some of the most recent

and important decisions on this subject: *Garmon v. Bangor*, 38 Maine 443; *Norris v. Litchfield*, 35 New Hamp. 271; *Robinson v. Cole*, 22 Verm. 213; *Trow v. Central Railroad*, 24 Verm. 297; *Hyder v. Jamaica*, 1 Williams 443; *Lane v. Crombie*, 12 Pick. 179; *Adams v. Carbott*, 21 Id. 145; *Lucas v. Taunton, &c., Railroad*, 6 Gray 72; *New Haven, &c., v. Vanderbilt*, 16 Conn. 420; *Birge v. Gardener*, 19 Id. 507; *Beers v. Housatonic, &c., Railroad*, Id. 566; *Parke v. O'Brien*, 23 Id. 339; *Neale v. Gillett*, Id. 437; *Daley v. Norwich, &c., Railroad*, 26 Id. 597; *Isbell v. N. Y. and N. H. Railroad*, 27 Id. 393; *Sheffield v. Railroad*, 21 Barb. 339; *Brooks v. Buffalo Railroad*, 25 Id. 600; *Dascomb v. Buffalo Railroad*, 27 Id. 221; *Mackay v. N. Y. Central*, Id. 528; *Eaton v. Brown*, 1 E. D. Smith 35; *Button v. Hudson Railroad*, 18 New York 248; *Steres v. Oswego, &c., Railroad*, Id. 426; *Johnson v. Hudson Railroad*, 20 Id. 74; *Higgen v. N. Y. & Harlem Railroad*, 2 Bosworth 132; *Runyan v. Central Railroad*, 1 Dutcher 556; *Moore v. Central Railroad*, 4 Zabriskie 258, 824; *Simpson v. Hand*, 6 Whart.

311; *Reeves v. Delaware, &c., Railroad*, 30 Penn. St. 454; *Rauch v. Lloyd*, 31 Penn. St. 358; *Pennsylvania Railroad v. Kelly*, Id. 372; *Pennsylvania Railroad v. Kilgore*, 32 Id. 292; *Pennsylvania Railroad v. Zebe*, 33 Id. 324; *Owings v. Jones*, 9 Maryl. 148; *Richard v. Wilmington, &c., Railroad*, 8 Richard L. 120; *Macon, &c., Railroad v. Davis*, 18 Geo. 679; *Macon, &c., Railroad Co. v. Winn*, 19 Id. 410; *Grant v. Mosely*, 29 Alab. 302; *Whiley v. White*, 1 Head, Tenn. 610; *Kerwhacker v. Cleveland, &c., Railroad*, 3 Ohio St. N. S. 172; *Simmons v. Central Railroad*, 6 Id. 105; *Cleveland, &c., Railroad v. Terry*, 8 Id. 570; *Indianapolis Railroad v. Galdwell*, 9 Ind. 397; *Dyer v. Talcott*, 16 Illin. 300; *Galena, &c., Railroad v. Fay*, Id. 558; *Jolliet, &c., Railroad Co. v. Jones*, 20 Ill. 225; *Galena, &c., Railroad v. Jacobs*, Id. 478; *Adams v. Wiggin Ferry Co.*, 27 Missouri 100; *Duggins v. Watson*, 15 Ark. 118; *Rusch v. City of Davenport*, 6 Clarke, Iowa 443; *Haulen v. City of Keokuk*, 7 Id. 443; *Stucke v. Railroad Co.*, Sup. Ct. Wisconsin, 7 Am. Law Reg. 732.

*587]

*SMITH v. LINDO.

Although an unlicensed person who assumes to act as a broker (in London) in the buying of shares in a public company, is, by reason of the statute 6 Ann. c. 16 incapacitated from suing for commission,—Held, by the Exchequer Chamber,—dissentiente, Crompton, J.,—that he may still recover money which by the usage of the share-market he has been obliged to pay to the seller as the price of the shares; there being nothing to show that the payment was made in pursuance of any *illegal contract*, or that it was a necessary part of the duty of a broker, *as such*, to pay the money.

THIS was an action for money payable for work done by the plaintiff for the defendant, at his request, as a broker, and for fees due and of right payable by the defendant to the plaintiff in respect thereof; and for scrip and shares sold and delivered by the plaintiff to the defendant; for money paid; and for money found to be due on accounts stated. There was also a special count which stated that the defendant retained and employed the plaintiff, or such broker as aforesaid, to purchase for the defendant certain scrip-certificates of shares on the London Stock-Exchange, to be paid for by the defendant on the then next settling-day

on the said exchange, for reward to the plaintiff; and the defendant, on such retainer, authorized and requested the plaintiff to purchase the said scrip according to the usual terms of the said exchange, one of such terms being, that, in the event of the shares not being paid for at the time fixed for payment by the contract of purchase, the purchaser's broker should be liable to indemnify the seller in respect of such default; that the defendant, on such retainer, agreed to save the plaintiff harmless in respect of such liability; that the plaintiff accepted such retainer, and did purchase the said scrip for the defendant on the said exchange, to be paid for on the said day, and on the terms aforesaid; and that the defendant did not, when the said day of payment (which had elapsed) arrived, save harmless, nor had he since saved harmless, the plaintiff in the premises, but the defendant made default in the payment for the said scrip, whereby the plaintiff became liable to the said seller as aforesaid, and the said seller had sued and recovered judgment against *the plaintiff in respect of the plaintiff's said liability, and the [*588 plaintiff had thereby been put to heavy expenses and liabilities.

The defendant pleaded, amongst other pleas,—fourthly, to the last count, as to so much of the residue of the declaration as related to work alleged to have been done and money alleged to have been paid by the plaintiff for the defendant, that the said work alleged to have been done by the plaintiff for the defendant was done by the plaintiff within the city of London, as a broker for the defendant, that is to say, in and about the purchasing and bargaining and making contracts for the purchase for and on behalf of the defendant of divers scrip-certificates purchased by the plaintiff for the defendant in a certain public company; that the said money alleged to have been paid by the plaintiff for the defendant was money paid by the plaintiff within the said city of London, as such broker as aforesaid, as the price of the said scrip-certificates, in fulfilment and performance of the said contracts; that the plaintiff made such payments in his own wrong, and without any express request whatever from the defendant to pay the same; and that, except and by way of implication from the said retainer and employment of the plaintiff to purchase the said scrip-certificates thereinbefore mentioned, *and from the usage and custom of the trade and business relating thereto*, there never was any request whatever to the plaintiff to pay the said price of the said scrip-certificates; that the said retainer and employment of the plaintiff in the last count mentioned was a retainer and employment of the plaintiff to act within the city of London as a broker, and to purchase as such broker the said scrip-certificates in the said last count mentioned for the defendant; that the said alleged purchase of the said scrip for the defendant in the last *count mentioned was [*589 made by the plaintiff within the city of London as a broker, and that the plaintiff was not at the several times of the doing of the said alleged work, and the payment of the said money alleged to have been paid, and of the said retainer, employment, and purchase in the said last count mentioned, or either of them, a broker duly licensed, authorized, or empowered to act or practise as a broker in the premises, or any of them, within the said city of London, contrary to the form of the statute in such case made and provided.

A verdict having been found for the plaintiff, the Court of Common Pleas, upon a motion to enter the verdict for the defendant upon the

fourth plea, held that the evidence sustained the plea, but they directed judgment to be entered for the plaintiff non obstante veredicto on that plea, on the ground that, although the plaintiff was by the 6 Ann. c. 16 rendered incapable of suing for commission, by reason of his not being duly licensed as a broker, yet that he might recover from his principal the price which pursuant to a usage of the share-market he had been obliged to pay to the person from whom he purchased,—the statute of Anne not making the *contract* void, but merely precluding the unlicensed broker from recovering any remuneration for his services in making it.

From this decision the defendant appealed, and the appeal came on to be argued in the Exchequer Chamber on the 18th of June, 1857, before Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., Watson, B., and Hill, J.

Collier (with whom was *Archibald*), for the defendant.—The 5th section of the 6 Ann. c. 16 imposes a penalty upon persons assuming to act as brokers within the city of London without being duly licensed: and *590] *Cope v. Rowlands*, 2 M. & W. 149,† is a distinct authority that an unlicensed broker cannot maintain an action for work and labour and commission for buying and selling stock, &c. Parke, B., there says: “It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: *Lord Holt, Bartlett v. Vinor*, Carth. 252. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract.” That has never since been questioned. The statute, then, having declared the act of an unlicensed person in buying and selling shares to be illegal, and so having disabled him from recovering commission, the question is whether he can recover moneys paid by him in pursuance of his illegal act. [MARTIN, B.—As between the contracting parties, the contract for the purchase and sale of the shares is good. The statute disables him from recovering in respect of his work and labour as a broker.] And also, it is submitted, from recovering in respect of payments made by him in carrying out his illegal act. [WIGHTMAN, J.—That is the question.] It is assumed in the judgment of the court below that this case is disposed of by *Pidgeon v. Burslem*, 3 Exch. 465,† and *Jessopp v. Lutwyche*, 10 Exch. 614.† But these two cases, it is submitted, are clearly distinguishable. [CROMPTON, J. *591] —The vice in the contract is, that the plaintiff *undertakes the employment illegally. The consideration for the repayment of the money to him, is his undertaking to do an illegal act. WIGHTMAN, J.—Is it illegal to undertake to pay the money? If the plaintiff became liable to pay the money to the seller of the shares, and the defendant got the benefit of the payment, I do not see why he should not recover. CROMPTON, J.—If there had been an express request, it might have been different. But the difficulty I feel, is, whether the whole does not rest upon the illegal consideration.] The decision in *Pidgeon v. Burslem*

turned upon the interpretation of the words of the plea, which alleged the payment of the money to have been made by virtue of the plaintiff's retainer as such broker, and *as incidental thereto*. It was pretty strongly intimated by the court, that, if the payment was a necessary part of the plaintiff's duty as broker, it could not be recovered. Parke, B., says: "It by no means follows from the use of this term in the plea, that the payment of these sums was a necessary part of his duty as broker. It may mean, and probably does, that, because he was employed as broker, it happened that he was also employed to pay the whole or part of the purchase-money of the shares for the defendant: but, *if so*, the plaintiff's disability to act as broker not rendering the *contract* void, but only dis-entitling him to any recompense for his services, there is no reason why he should not recover from the defendant the money he has paid at his request, express or implied." [CROMPTON, J.—If it had been part of the original contract, I could understand it. But I do not very clearly see the meaning of "part of his duty." BRAMWELL, B.—The real question is, whether upon this record we can see that the payment of the money by the plaintiff was part of the contract.] There is but one contract here, and one consideration: the consideration being void, *the whole contract is void. *Jessopp v. Lutwyche*, 10 Exch. 614,† is equally inapplicable. There, to a declaration for money [*592 paid, and on accounts stated, the defendant pleaded,—first, that the causes of action accrued after the passing of the 8 & 9 Vict. c. 109, under and by virtue of certain contracts made between the plaintiff and defendant, by way of gaming upon the market price of shares,—secondly, that the causes of action accrued to the plaintiff as a broker in the city of London, about the purchasing and selling for the defendant in the city of London of shares, and that the plaintiff was not duly licensed in pursuance of the statute: and it was held, upon the authority of *Pidgeon v. Burslem*, that both pleas were bad; Parke, B., saying: "It is consistent with the pleas that the defendant requested the plaintiff to pay over the money for him to a third party, and that in fact it was so paid; in which case the defendant has no defence." Here, the whole consideration is, the undertaking of the plaintiff to do an act which the statute absolutely prohibits.

Bovill, Q. C. (with whom was *Geary*), *contra*.—To make the plea good, it was necessary to show how the money was paid. How does the defendant do that? By setting up the usage of trade; which is simply setting up a request to pay: it cannot be put higher. There is no allegation that the money was paid by the plaintiff *as broker*. [CROMPTON, J.—How is the usage of trade binding? By its being imported into the original contract of employment. If you expand it, it is part of the contract. The consideration is, that the plaintiff is to act as a broker.] That a person who deals in this description of property is a broker, is clear: *Clarke v. Powell*, 4 B. & Ad. 846 (E. C. L. R. vol. 24); *Milford v. Hughes*, 16 M. & W. 174.† No doubt, the plaintiff here *was employed as a broker to make the contract for the purchase [*593 of the shares; and it is equally clear that he was not in a position to claim commission. But the *contract* is not void: and the money having necessarily been paid by the plaintiff, in accordance with the usage of the trade, the two cases of *Pidgeon v. Burslem*, 8 Exch. 465,† and *Jessopp v. Lutwyche*, 10 Exch. 614,† distinctly show that the

plaintiff is entitled to call upon the defendant to reimburse him. The plea does not allege that the money was paid by the plaintiff in the course or by reason or in consequence of his employment as a broker; but that the payment was made by reason of the usage and custom of the trade and business. It is quite consistent with the plea, that the request to pay was contemporaneous with the payment of the money. In *Knight v. Cambers*, 15 C. B. 562 (E. C. L. R. vol. 80),—where it was held to be no answer to an action for money paid by the plaintiff for the defendant's use, at his request, that the money was paid in respect of losses on wagering contracts made void by the statute 8 & 9 Vict. c. 109, s. 18,—Maule, J., says: "Assuming the original contracts to have been void, there is nothing to prevent the plaintiff from recovering money afterwards paid by him at the defendant's request." [CROMPTON, J.—If the usage of trade does not bind the defendant by the original bargain, I cannot see how it can bind him at all. BRAMWELL, B.—Suppose the plaintiff had refused to pay the money, and the seller of the shares had brought an action against him for the price, could he have defended himself by showing that he was not a licensed broker?] Certainly not.

Collier, in reply.—The usage of the trade must be part of the original contract. [WATSON, B.—Is it not consistent with the plea that there may have been two contracts,—the one, as broker, to buy the shares—*594] the *other, on an implied request arising out of the usage of the business, to pay the money?] The plain and obvious meaning of the plea is this, that the plaintiff is not entitled to recover at all, the money not having been paid at the defendant's request, unless the whole was one contract. This was the ground upon which *Taylor v. Stray*, 2 C. B. N. S. 175 (E. C. L. R. vol. 89), proceeded. The payment was made in pursuance of the original contract: it was a necessary consequence of the direction to the plaintiff to buy the shares.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the majority of the court:—

The question in this case is, whether the plaintiff (below) is entitled to judgment, notwithstanding the verdict of the jury upon the fourth plea.

That plea is pleaded as an answer not only to the demand of the plaintiff in respect of the work and labour of the plaintiff, but also of the money paid by him on account of the defendant.

The Court of Common Pleas were of opinion that the plea, being pleaded not only to the charge for work and labour, but also to that for money paid, gave judgment for the plaintiff in the action non obstante veredicto: and we are of opinion that that judgment is right.

The plea states that the work was done by the plaintiff within the city of London, as a broker, for the defendant, in and about the purchasing, and making contracts for the defendant for the purchase, of scrip-certificates in a public company, and that the money alleged to have been paid by the plaintiff for the defendant, was money paid by the plaintiff within the city of London, as such broker, as the price of *595] the *scrip-certificates, in fulfilment of the said contracts, and without any express request from the defendant to pay the same; and that, except and by implication from the said retainer and employ-

ment of the plaintiff to purchase the said scrip-certificates, and from the usage and custom of the trade and business relating thereto, there was never any request whatever to the plaintiff to pay the price of the scrip-certificates. It is then averred, that, at the time of the alleged work and payment of the money, the plaintiff (below) was not a broker licensed to act as a broker in the premises within the city of London, contrary to the statute.

In *Pidgeon v. Burslem*, 3 Exch. 470,† the Court of Exchequer held, that, in such a case as the present, the plaintiff's disability to act as a broker not rendering the contract void, but only disentitling the plaintiff to any recompense for his services, there was no reason why he should not recover from the defendant the money he had paid at his request, express or implied.

The case differs from those in which the contract is illegal, or where the purpose for which the money is paid is illegal. In the present case, the contract was perfectly legal; and we are not aware of any legal objection to the contract being fulfilled. In *Taylor v. Stray*, 2 C. B. N. S. 175, 197 (E. C. L. R. vol. 89), it was held by the Exchequer Chamber, that the defendant, by directing the plaintiffs to purchase shares, necessarily gave them authority to pay for them according to the rules of the Stock-Exchange. In the present case, the plea states that the plaintiff had no request from the defendant to pay the price of the shares, except by implication from the usage and custom of the trade and business relating thereto. This we think, is sufficient to raise an implied authority from the defendant to the plaintiff to pay for the shares which he authorized him to purchase,—according to the case already cited, of *Taylor v. Stray*. Such a payment made by the plaintiff under [*596 the implied authority would be good, as it is not made in pursu-
ance of any illegal contract; nor does it appear to be a necessary part of the duty of a broker, as such.

We are, therefore, of opinion that the judgment of the Court of Common Pleas should be affirmed.

My Brother Crompton does not agree in this judgment, as he is disposed to think that the payment of the commission and the repayment of the price both stand on the same footing, and that the promise to pay the one and repay the other arise out of one and the same contract; and that the doing the work, which was illegal, on the part of the plaintiff, was the consideration for the promise both to pay the commission, and to repay, or indemnify the plaintiff against, the price of the shares, if he had to pay for them. The plea seems to him to negative any request to pay, except that which arises from the retainer and employment, and from the usage, which is incorporated with and part of the contract of retainer.

Judgment affirmed.(a)

(a) See the judgment of the court below, 4 C. B. N. S. 395 (E. C. L. R. vol. 91), and note at p. 411.

***597] *JOHN BOYD and Another v. JOSEPH ROBINS and NATHAN LANGLANDS,**

In July, 1850, A. and B. gave C. a guarantee (continuing) for 200*l.*, for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200*l.* was due in respect thereof. In June, 1853, B. became bankrupt, and duly obtained his certificate:—Held, by the Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that B.'s liability upon this guarantee was not a "contingent liability" within the 178th section of the 12 & 13 Vict. c. 106, and consequently that his certificate was no bar to a claim in respect of goods supplied to D. after the bankruptcy of B.

In this case the defendant Robins suffered judgment by default, and the defendant Langlands and the plaintiffs agreed to state a case for the opinion of the Court of Common Pleas upon the construction of the guarantee upon which the action was brought. The case was argued in Trinity Term last, and the court, after time taken to consider, gave judgment in favour of the defendant Langlands. See Vol. IV., p. 749. Upon this judgment the plaintiffs brought a writ of error, which was argued before Pollock, C. B., Wightman, J., Erle, J., Watson, B., Channell, B., and Hill, J.

C. W. Wood, for the plaintiffs.—The plaintiffs' claim is in respect of goods supplied to Kerr after the bankruptcy and certificate of the defendant Langlands, and consequently is not discharged by the certificate. The liability of Langlands was not a contingent liability within the 178th section of the 12 & 13 Vict. c. 106: the bankrupt law was never intended to relieve a trader from such a liability as this,—a liability the continuance of which might at any time be determined by his own act. The cases of *Warburg v. Tucker*, 5 Ellis & B. 384 (E. C. L. R. vol. 85), *Young v. Winter*, 16 C. B. 401 (E. C. L. R. vol. 81), *Maples, app., Pepper, resp.* 18 C. B. 177 (E. C. L. R. vol. 86), *Ex parte Todd*, *In re Williamson*, 24 Law. J., Bankruptcy, 20, and *Ex parte Barwis*, *In re Straham*, 25 Law. J., Bankruptcy, 10, were cited and commented upon.

598] *Aspland, for Langlands.(a)—The primary object of the *bankrupt laws, is, to free the trader from all his liabilities. The 178th section was intended to embrace every description of contingent liability to pay money. A case is not excluded from its operation merely by reason of a difficulty in estimating the value of the contingency. Under the 174th section, the value of policies of insurance of various kinds may have to be proved,—such as, insurance against frauds by collectors of rates, &c., against cattle dying, accidents to plate-glass, railway accidents, and various other contingencies. The contingency here,—that goods are supplied, and that the person to whom they are supplied fails to pay for them,—is just as susceptible of valuation as any of those. [HILL, J.—Suppose a man contracts to supply a trader with goods for five or ten years at a fixed price, and the trader within the period becomes bankrupt and obtains his certificate, and goods after-

(a) No final judgment having been entered against the defendant Robins, it was objected that the record was incomplete, and therefore error could not be brought. Reference was made to the 42d and 46th sections of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, and the 32d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, and also to the case of *Tolson v. Kaye*, 6 M. & G. 536 (E. C. L. R. vol. 46), 7 Scott N. R. 222. The court, however, expressed no opinion upon the point.

wards continue to be supplied on the terms of the contract, could not the person supplying them recover the value of the goods so supplied?] No doubt he could. It would be a new contract. *Lane v. Burghart*, 3 M. & G. 597 (E. C. L. R. vol. 42), 4 Scott N. R. 287, *Abbott v. Hicks*, 5 N. C. 578 (E. C. L. R. vol. 35), 7 Scott 715, *The South Staffordshire Railway Company v. Burnside*, 5 Exch. 129,† and *Hankin v. Bennett*, 8 Exch. 107,† were referred to.

Wood was heard in reply.

POLLOCK, C. B.—All we have to consider in this case *is, the claim of the plaintiffs to be repaid by Langlands for the goods supplied to Kerr after the bankruptcy and certificate of Langlands. We are of opinion that the 178th section of the 12 & 13 Vict. c. 106 does not apply to a case like this, and that a liability upon a guarantee under which goods are supplied after the bankruptcy is not discharged by the certificate of the surety. We arrive at this conclusion without reference to the power which the surety had to put an end to his liability under the guarantee by giving notice. The judgment of the Court of Common Pleas cannot be sustained. Judgment reversed.

See note to this case, 4 C. B. 759.

CASES
ARGUED AND DECIDED
IN THE
COURT OF COMMON PLEAS,

IN
MILARY TERM,

IN THE
XXII. VICTORIA. 1858.

The Judges who usually sat in Banc in this Term, were:

COCKBURN, C. J.
WILLIAMS, J.

CROWDER, J.
WILLES, J.

MEMORANDA.

IN the Vacation preceding this Term, Benjamin Bridges Hunter Rodwell, Esq., of the Middle Temple, George Markham Giffard, Esq., of the Inner Temple, and Henry Hawkins, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the Law.

They were accordingly called within the Bar on the first day of Term.

*601] *BALFOUR and Another v. ERNEST, Official Manager of
THE SEA FIRE LIFE-ASSURANCE SOCIETY. Jan. 24.

The Port of London Shipowners' Loan and Assurance Company was amalgamated with the Sea Fire Life Assurance Society by a deed which was subsequently judicially declared to be illegal and void. By the deed of settlement of the latter company the directors were authorized to draw and accept bills *for the purposes of the company*. The plaintiffs had before the so-called amalgamation effected a policy with the Port of London Company, upon which they sustained a loss, in satisfaction of which the directors of the Sea Fire Life Society, after the amalgamation, gave them a bill drawn by them upon their cashier:—

Held, that the latter company were not liable upon this bill, it not having been drawn for the legitimate purposes of the company, and the plaintiffs being bound to take notice of the contents of the deed of settlement, and therefore cognizant of the want of authority in the directors to draw the bill.

THIS was an action of debt originally brought against The Sea Fire Life-Assurance Society on the 19th of January, 1850.

The declaration alleged, that, on the 1st of November, 1849, the society made their bill of exchange in writing, and directed the same to a person described therein as the cashier, marine department, Sea Fire Life-Assurance Society, and thereby required the said cashier sixty days after the date of the said bill (which period had elapsed before the commencement of this suit) to pay to the plaintiffs, or their order, the sum of 500*l.*, but that the said cashier did not pay to the plaintiffs the sum of 500*l.*, or any part thereof, although the said bill was duly presented to him when it became due,—of which the said society had due notice.

There were also counts for money had and received to the plaintiffs' use, and for money due on accounts stated.

The society denied the making of the alleged bill of exchange, and pleaded never indebted to the residue of the declaration; on which pleas issue was joined.

A suggestion was afterwards entered on the record, showing (as the fact was) that an order absolute had been made under the Joint-Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45), for winding up the said company under the provisions of that act, and that Henry Ernest had been duly appointed official manager of the company; and the said official *manager was thereby duly substituted as the [602 defendant in the action in the place of the said society.

The cause came on for trial at the London sittings after Michaelmas Term, 1857, before Crowder, J., when a verdict was taken by consent for the plaintiffs for 698*l.* 7*s.* 6*d.*, the amount mentioned in the alleged bill of exchange, with interest thereon, subject to the opinion of the court upon the following case:—

The plaintiffs are iron-founders and merchants carrying on business at Leven, near Glasgow; and the said Sea Fire Life-Assurance Society was, on the 1st of November, 1849, a joint-stock company completely registered under the provisions of the 7 & 8 Vict. c. 110, and carrying on business at No. 31, Cornhill, London.

The said society was provisionally registered on the 16th of July, 1849, and completely registered on the 8th of October following; and it was constituted by and under a deed of settlement dated the 31st of October, 1849, whereby,—after reciting the provisional registration of the society,—it was covenanted and agreed that the shareholders, who were upwards of — in number, should be and did constitute a joint-stock company within the meaning of the said last-mentioned act, to be called "The Sea Fire Life-Assurance Society:" and, with regard to the business of the company, and the powers of the directors, the only provisions contained in the said deed were as follows:—

"2. *Business.* That the business of the company shall be, in the first place, generally, to insure against the perils of the seas, fire, men of war, rovers, reprisals, and all other risks of the like nature incident to the seas, ships, vessels, and craft, of all descriptions, and also the goods, freight, merchandise, cargo, earnings, and property whatsoever in or on board of the same, whether the property of shareholders in the *capital stock of the company or otherwise howsoever, so far as [603 the same may be effected or made according to law; and also to

insure all other matters and things which lawfully may or can be from time to time insured, or be the subject of insurance, against perils of the sea; and also to advance to any person or persons whatever, whether a shareholder or shareholders in the capital stock of the company or not, any sum or sums of money by way of a loan, to be secured by mortgage, upon any ship, vessel, or craft, whether in a state of completeness for prosecuting any voyage or undertaking, or not; and also generally to carry on commission business, and all other branches and departments of the above business of marine insurance and loans on ships, vessels, or craft, or any of them, or in anywise connected therewith or incidental thereto; and also to make and effect all insurances on lives or survivorships, or on all or any contingencies, incidents, or accidents and casualties whatsoever relating to or connected with lives or survivorships which may be effected according to law; and also to grant and to purchase and sell endowments and annuities either for lives or for years or on survivorships, and either immediate, deferred, reversionary, or contingent, and also life, reversionary, and other estates and interests real or personal; and to advance money by way of loan or mortgage or other security; and for other purposes to acquire and hold such lands, hereditaments, and real estate as may be requisite, and to carry on the business of life-assurances generally, and of any annuity, endowment, loan, and reversionary association in all their respective branches or departments, or of such of the same branches and departments respectively as may be expedient or advisable; and also to make or effect assurances against loss or damage by fire to all kinds and *604] descriptions of property whatever; and to carry on the *business generally of a fire-insurance office so far as the same may be done according to law; and also to make, issue, and effect policies of insurance needful for the purpose of securing the fidelity of persons in situations of trust; and generally to carry on the business of a guarantee association in all its branches, so far as the same may be done according to law.

"28. *Quorum of board of directors.* That, except the managing officer, who, whether a director or not, shall always be entitled to be present at the board of directors, no person not a director shall be present at the board of directors: that three or more directors shall constitute a meeting, and shall be competent to exercise the several powers and authorities hereby conferred on the directors generally, or on the board of directors.

"31. *General power of directors.* That the directors shall cause the company forthwith to be completely registered under the registration act, and shall thereupon be entitled to all the powers and authorities conferred on the directors of a completely registered company by the same act, but subject as hereinafter provided; and that, in and about effecting the incorporation and registration of the company, they shall be authorized and empowered to liquidate and defray such preliminary expenses as may have been incurred prior to the complete registration thereof, not exceeding the sum of 1000*l.*, which said sum of 1000*l.*, or any lesser sum, shall be chargeable against the company, and paid out of the capital stock and corporate funds of the same; and also that the directors shall have at any time after complete registration full power and authority to purchase or lease, as may seem expedient, at such price

and on such terms and conditions as may be lawfully imposed, the business of any other fire, life, or marine insurance company, and *for that purpose to enter into and rescind or modify contracts or [*605 agreements in the name of the Sea Fire Life-Assurance Society, and of the shareholders thereof.

"32. *Powers of the directors to contract loans.* That the directors shall have full power and authority from and at any time or times after the complete registration of the company, to contract such loan or loans, and borrow such moneys at such rate or rates of interest, and upon such security, whether of debentures, bonds, or mortgages of the property of the company, or otherwise, on behalf of and for furthering the objects and business of the company, as to the said directors shall seem fit, provided that the aggregate amount of such loans do not at any time exceed the sum of 1,000,000*l.* sterling; and that the directors may have power to pledge the credit and capital, and mortgage the property and effects, whether real or personal, of the company, for securing the repayment of such loans and interest in such manner as they shall in their absolute discretion think most proper and advantageous; and that the moneys so borrowed shall be employed, until the repayment thereof, in the manner thereafter provided.

"33. *Power of directors to conduct business.* That the directors shall have full and absolute power, authority, and discretion to conduct and manage, and in and about conducting and managing, the affairs and business of the company, and therein at any time after the complete registration of the company to prepare and issue, and cause to be prepared and issued, all such policies of assurance on such life or lives, and to grant such endowments, annuities, and loans, and to purchase and sell such reversionary and other contingent interests, whether real or personal, and such interests in stock, or in mortgage-debts or other personalty, legacies, post-obit bonds, or annuities, and generally to *do and engage in such other acts, transactions, matters, and [*606 things in the line of the company's business, in such cases and on such applications, and on such contingencies and risks, at such rates, and on such terms and securities, and at such premiums, whether in a gross sum, or payable monthly, quarterly, half-yearly, or yearly, or on any half or whole credit system, or on any ascending or descending scale or otherwise, and generally in such manner and in such form and on such conditions, or in different forms, as shall to the said directors, or to the managing officer duly authorized and empowered in that respect, in their or his absolute discretion, seem expedient; and also to prepare and issue, or cause to be prepared and issued, such policies of assurance against risk of or loss or damage by fire as may be usual or necessary for the business of a fire assurance office, on such conditions and subject to such regulations as to the said directors in their absolute discretion shall seem expedient; and also to prepare and issue, and cause to be prepared and issued, all such policies of assurance for assuring the absolute fidelity of persons in situations of trust, as may be usual or necessary for a guarantee association, subject to such regulations as to the said directors in their absolute discretion shall seem expedient: Provided always that the moneys payable in respect of such life or fire policy of assurance shall be borne and satisfied, as hereinafter provided, only out of the accumulated premiums, contributions, and receipts (how-

ever arising), moneys, property, and effects accruing from or belonging to that particular branch of the business in which any such claim or claims may arise, and shall in no case be chargeable on or payable out of or borne by such portion or portions of the capital stock and corporate fund of the company as may be accumulated or accrue from payments made in respect of shares subscribed for in the capital of the company, or for the sale of any stock which shall have been purchased by or forfeited to the company and afterwards sold, or from the produce of premiums, profits, and receipts accruing and to be received in respect of any marine policies of assurance, or of any of the commission or loan branches connected therewith or incidental thereto, or of the guarantee branch of the business of the said company; and provided also, that, in case either one or more of the after-mentioned funds directed to be formed cannot be made available in time, or shall be insufficient to satisfy its own losses and its share of the expenses of the outfit, establishment, and management, a competent part shall be borrowed from all or any one (as to the directors may seem expedient) of the other funds hereinafter described, and applied to meet such exigency and deficiency; the sum or sums so borrowed to be repaid, with interest at 5 per cent. per annum, out of the fund on account of which such amount shall have been borrowed.

“39 *Power of directors to pay moneys assured.* That the directors shall have full power and authority to pay and discharge all claims arising from any policies, whether of fire, life, marine, or guarantee assurance, granted by the company under any clause of these presents or otherwise howsoever, upon such evidence of the said claims as to the said directors may appear sufficient, and with or without personal indemnity of any person or persons with whose character and responsibility the said directors shall be satisfied; and, in case, upon the application of any person or persons who, at the time of making such application, shall to the satisfaction of the said directors prove himself or themselves rightfully entitled to receive the sum or sums assured by any policy issued by the company which shall have become payable, such person or persons shall be unable to produce the policy, or, whether producing or not producing the same, shall be unable to establish a complete legal title to such policy, or to give a discharge at law for the sum thereby assured or payable thereunder, then and in either of the said cases, if the directors shall be satisfied that the failure to produce the said policy has been occasioned by the loss or mislaying of the same, and that such defect in the legal title of such person or persons, or his or their inability to give such discharge at law, does not extend to or affect his or their actual right to the said policy, or to the money to become payable thereon, it shall be lawful for the said directors, if they shall in their discretion think fit, to pay the sum or sums which shall or may become payable under or by virtue of such policy of assurance, with or without the personal indemnity of any person or persons with whose character and responsibility the said directors shall in their discretion be satisfied.

“43. *General power of directors as to their business.* That the directors shall have full power and authority, where these presents are silent or omit to provide the requisite particulars, to conduct and manage the affairs of the company in the prosecution of the business of the same as

hereinbefore defined, and shall in particular be and they are hereby authorized to carry on all such branches of the aforesaid business or otherwise as they may think fit, and shall have power to do such other acts, matters, and things as may be requisite for effecting the objects or carrying on the business of the company, upon such terms and conditions as they shall think expedient; and shall also have power, where these presents do not regulate any salary of any officer of the company, to fix and regulate the salaries of any clerks, officers, and servants of the company *whom they may appoint, or who may [*609 be appointed by any general meeting; and shall also have power, with the sanction of a general meeting, but not otherwise, to apply for and obtain any letters patent or act of parliament for conferring additional powers on the company and limiting the liabilities of the shareholders, or otherwise, as it shall be thought desirable or can be procured; and generally to act in the management and superintendence of all the concerns of the company in such manner as they shall think most conducive to the interest of the company, but subject, nevertheless, to the whole of the aforesaid powers, to the rules and restrictions by these presents imposed, and to the consent of a general meeting, where such consent by these presents is made necessary, and subject also to any restrictions hereafter to be imposed by any general meeting, ordinary or extraordinary, pursuant to the powers hereinbefore given to such meeting.

"44. *Directors to accept bills or notes.* That the directors shall and they are hereby authorized to make and issue, endorse, and accept, in the name of and on account of the company, such bills of exchange and promissory notes as they may think expedient; provided that the total amount of such bills and notes due (?) at any one time shall not exceed the sum of 100,000*l.*: and all such bills and notes, and no other, shall be so made and issued, endorsed, or accepted, as to be binding on the company, and on the shareholders, and each of them, to the extent of the respective shares held by them in the capital stock of the company, and no further or otherwise.

"45. *Limitations of directors as to borrowing moneys and contracting liabilities.* That it shall not be lawful for the directors to borrow any sum of money on behalf of the company, except under the 32d clause of these presents; and that, in contracting debts and *liabilities [*610 on behalf of the company, the directors shall not exceed the usual period of credit according to the customs of the several trades or business with which the directors shall from time to time deal, contract with, or be engaged in."

A copy of this deed of settlement was deposited with the registrar of joint-stock companies, pursuant to the provisions of the last-mentioned act.

Before the formation of the said society, there existed a joint-stock company consisting of upwards of — members, called The Port of London Ship-Owners' Loan and Assurance Company (hereinafter called, for brevity, The Port of London Company), established for the purpose of marine insurance; which company was provisionally registered on the 24th of February, 1847, and completely registered on the 22d of April, 1847, pursuant to the provision of the last-mentioned act.

By the deed of settlement of this company, the business of it was

declared to be, to insure against the perils of the seas, fire, and all such other risks as the directors should think fit, the ships, goods, freight, &c., of the shareholders and others, and all other matters which might lawfully be insured against such perils, and to advance money on bottomry and respondentia, and to carry on commission business on all other matters connected with ships or incidental thereto.

There was no power in the deed to carry on the business of fire and life assurance, nor was there any clause therein authorizing the directors or the managing or other officers of the company to sell or dispose of the business of the company, or any part thereof.

Augustus Collingridge was by the 53d clause of the deed appointed the managing officer of the company. The managing officer might or *611] might not be a director. *His duties were, to keep the books, to keep the common seal of the company, and, when thereto required by the directors, and in the presence of any two of them, to countersign checks on the company's bankers, and to affix the seal of the company to instruments requiring the same, and to receive and prepare, and, if necessary, present to the proper parties, all writings required in transacting the business of the company.

In February, 1849, the said Mr. Collingridge and Mr. Alands, the chairman of the Port of London Company, gave instructions to Mr. Chapple, the solicitor of that company, to prepare a deed for the amalgamation of the Port of London Company with the Sea Fire Company; and afterwards, in September, 1849, by direction of Mr. Collingridge alone, Mr. Chapple prepared a deed for that purpose.

By an indenture dated the 11th of October, 1849, and expressed to be made between the Port of London Company of the one part, and the said society of the other part, under the seals of the said company and society, it was witnessed that the Port of London Company assigned to the said society all the trade and business of general marine assurance, and all other the trade or business, if any, of the Port of London Company, and the good-will and capital stock and book and other debts and property and effects thereof respectively, and all benefit and advantage thereof respectively, and all books, papers, and accounts of and relating to the said business; and the Port of London Company covenanted to give public notice of the assignment thereby made, and that the said company and their successors would not at any time thereafter carry on the business of marine insurance in any of its branches: and, in consideration of the said assignment and covenant on the part of the Port of London Company, it was witnessed in and by the same deed *612] that *the said society covenanted to indemnify the Port of London

Company, and the past and present shareholders therein, and the estate and effects of such shareholders, against all actions, suits, costs, charges, damages, expenses, and consequences whatsoever which then were, or should or might thereafter be instituted, prosecuted, sustained, or occasioned, or which the said last-mentioned company, or any of the shareholders thereof, should be put unto by reason of any claim or demand which was or might thereafter be made against the said last-mentioned company, whether in respect of any policy of assurance and promissory or credit note respectively made and issued by them, or on any other account or pretence whatsoever.

This deed was engrossed in duplicate, and the duplicates were inter-

changed. The Sea Fire Society's duplicate bore the signatures "Alexander Davis" and "William Ogilvie," who were described as, and were in fact, directors of the Sea Fire Life Assurance Society; and the seal of that society was impressed upon the deed in the presence of the said Augustus Collingridge, who was one of the directors and the managing officer of the Sea Fire Society.

The Port of London Company's duplicate was executed by two of the directors of that company, of whom the said Augustus Collingridge was one; but there was no board meeting, or any other meeting of the company or of the directors at the time of execution.

No instructions were ever given by the directors of the Sea Fire Company to their solicitor to prepare or approve that deed, or any other instructions in reference thereto; and no meeting of directors was ever held after the complete registration of the said society and before the said execution of the said deed.

In June, 1849, before the provisional registration of the Sea Fire Company, the said Augustus Collingridge *directed Mr. Ashford, [613 the accountant of the Port of London Company, to change the name of that company into the Sea Fire Company, and to transfer the balances in the books to the account of the Sea Fire Company: but no meeting of the Port of London Company was ever held with reference to this change of name or transfer of the business; nor was any meeting ever held of the Sea Fire Company's directors, to sanction this step,—the whole business being managed by Collingridge alone.

None of the facts hereinbefore mentioned were known to the said plaintiffs when they received the instrument declared on, as hereinafter mentioned.

The plaintiffs, as such merchants as aforesaid, effected a policy of assurance with the said Port of London Company on the 22d of August, 1848, on a ship called "The Atlantic;" and previously to the month of June, 1849, a sum of 500*l.* had become and was then due to the plaintiffs from the said Port of London Company in respect thereof.

On the 12th of June, 1849, the plaintiffs applied by letter to the said Port of London Company for payment of the said debt; and, in answer thereto, they received from Collingridge, the managing director of the said Sea Fire Company, a letter, as follows:—

"Sea Fire Life Assurance Office,
"31, Cornhill, London.

"Messrs. Balfour & Co., Leven.

"Gentlemen,—In reply to your letter of the 12th instant, I have the pleasure to inform you that the directors of the Port of London Assurance Company have passed the claim per Atlantic, subject, as there is a deficiency of legal proofs (although there can be little question as to the merits), to the confirmation of the Sea Fire Life Assurance Office, to whom the whole business is in course of immediate transfer. I have no *doubt that the board will, under the peculiar circumstances, [614 deal with the case in the same spirit, and consent to have it included in the list of payments to be made out of the funds appropriated for the discharge of all obligations arising upon Port of London policies; and, as the managing director, I shall feel myself bound to recommend their so doing.

"AUGUSTUS COLLINGRIDGE, Managing Director."

In consequence of this letter, the plaintiffs made several applications to the Sea Fire Life Assurance Society for payment of the said debt; and, in October, 1849, and in the beginning of the following month of November, they informed the said society that legal proceedings would be immediately taken to enforce payment thereof: and, on the 5th of November, 1849, the plaintiffs received from the said society on account and in payment of the said debt, a document of which the following is a copy:—

“Marine Department Sea Fire Life Assurance Society,
“31, Cornhill. Nov. 1st, 1849.

“To the Cashier.

“No. 4020. £500 0 0

“Sixty days after date, credit Messrs. Balfour & Co., or order, with the sum of five hundred pounds, claim per Atlantic, in cash, on account of this corporation.

“Entered,

“T. F. A., Acct.

“ALEX. DAVIS } Directors.”
“W. OGILVIE }

This is the document upon which the first count of the declaration and the count on an account stated are founded. It was sealed with the seal of the society, and was signed by Alexander Davis and Sir William Ogilvie, two of the directors thereof, being the same Alexander Davis and William Ogilvie mentioned in the former part of this case. The initials T. F. A. in the left-hand corner of it, were those of Thomas *615] *Frederick Ashford, who, on the 1st of November, 1849, and for some time before and since that day, was the secretary of the said society. The said document was on the day of the date thereof duly entered by him in the books of the society.

At the date of the said document, and for more than sixty-three days continuously afterwards, Mr. — was and acted as the cashier of the society, and was the person to whom the said document was addressed.

The said Alexander Davis was at and before the time of the formation of the said society, and from thence until and after he signed and issued the said document, a director and shareholder in the said Port of London Company, and had duly executed the deed of settlement thereof, and had been duly returned, and during all the time last aforesaid was registered, as such director and shareholder, pursuant to the provisions of the said last-mentioned act: but the plaintiffs were not aware of these last-mentioned facts when the said document was made and delivered to them, nor until after the present action was brought.

Before and at the time of the registration of the said society, and from thence until and at the time when the said document was made and issued, the said Port of London Company was insolvent and unable to discharge its liabilities. The said Sea Fire Society, during the same period, was solvent, and continued so to be for some months after the making and issuing of the said instrument.

It was agreed that none of the facts or documents appearing in this special case should affect either party upon the argument of the case, unless the court should be of opinion that the same would have been receivable in evidence under the issues joined in this action.

The court was to be at liberty to draw any inferences of fact which *616] a jury might properly draw from the *facts above stated which would have been so receivable, and was to have all the powers of

amendment and otherwise of a judge sitting at Nisi Prius. The pleadings were to form part of the case.

The question for the opinion of the court, is,—whether the plaintiffs are entitled to recover. If the court should be of opinion that they are so entitled, the verdict for the plaintiffs is to stand, and judgment is to be entered for the amount thereof, and costs. If the court should be of a contrary opinion, judgment is to be entered for the defendant.

Phipson (with whom was *G. Tayler*), for the plaintiffs.(a)—It has already been decided in this court that the instrument upon which this action is brought may be declared on either as a bill of exchange or as a *promissory note: *Ellison v. Collingridge*, 9 C. B. 570 (E. C. [*617 L. R. vol. 67], *Allen v. The Sea Fire Life Assurance Company*, [*617 9 C. B. 574; and *Aggs v. Nicholson*, 1 Hurlst. & N. 165,† and *Lindus v. Melrose*, 2 Hurlst. & N. 293,† show that the company are liable upon it, and not the persons who signed it. The substantial question then is, whether this is a bill or note which is binding on the company as a corporation, looking to the circumstances which may legitimately be given in evidence. That depends mainly upon the construction to be put upon the 45th section of the Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110, and the 44th clause of the deed of settlement of the Sea Fire Life Assurance Society. The 45th section enacts, “with regard to bills of exchange and promissory notes made, accepted, or endorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or endorsing the same, and to the liability of any such company thereon, that, if the directors of the company be authorized by deed of settlement or by-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company on whose behalf or account, the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the company on whose behalf the same is expressed to be made or accepted; and that every bill of exchange so made as aforesaid, or received by or on behalf of the company, may be endorsed in the name of the company by any officer authorized by deed of settlement or by-law in that behalf; and that every such bill of exchange

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

“1. That the instrument of the 1st of November, 1849, signed by Alexander Davis and William Ogilvie on account of the Sea Fire Life Assurance Society, is properly declared on as a bill of exchange; and that, under the circumstances mentioned in the case, the said instrument was a bill of exchange binding on the said society:

“2. That the bill of exchange being given by the Sea Fire Life Assurance Society for a cause in respect of which the plaintiffs had a right to require payment, there was a valid and sufficient consideration for the said bill, binding on the said society as the drawers of the bill:

“3. That the bill was one, under the circumstances of this case, which the directors signing it were authorized to draw on behalf of the society:

“4. That, in any event, the directors of the said society having authority to draw bills, the bill in question is binding on the society in the hands of the plaintiffs, who had no notice of any want of authority in this instance:

“5. That the plaintiffs are not affected by any failure of consideration as between the Port of London Company and the said society.”

*618] *or promissory note so made, accepted, or endorsed as aforesaid, shall, immediately after the making, accepting, or endorsing of the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted, or endorsed, and such last-mentioned officer shall enter the same in proper books to be kept for that purpose; and that, if any such bill of exchange or promissory note be not so reported and entered, then the officer by whose default such bill or note shall not be so reported or entered shall be liable to repay to the company the amount which the company shall pay or be liable to pay in respect of such bill or note: Provided always, that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon, except as shareholders of the company; and that every such company on whose behalf or account any bill of exchange or promissory note shall be made, accepted, or endorsed in manner and form aforesaid, shall and may sue and be sued thereon as fully and effectually, and in the same manner, as in the case of any contract made and entered into under their common seal." Here these directions have been studiously complied with. The 44th clause of the deed of settlement expressly authorizes the director to draw, accept, and endorse bills and notes, so that the total amount due at any one time shall not exceed 100,000*l*. Questions have arisen, both at law and in equity, as to the meaning of this clause, inasmuch as it professes to limit the liability of the shareholders: and it has been held that its application was confined to the shareholders themselves: *Peddell v. Gwyn*, 1 Hurlst. & N. 590;† *Gordon v. The Sea Fire Life Assurance Society*, 1 Hurlst. & N. 599;† In re *The Sea Fire*

*619] *Life Assurance Company* (**Greenwood's Case*), 3 De Gex, M'N. & G. 459. This instrument, then, is properly declared upon as a bill of exchange, and has been drawn in conformity with the 45th section of the 7 & 8 Vict. c. 110, and the shareholders are liable upon it notwithstanding the limitation sought to be imposed by the 44th clause of the society's deed of settlement. But it will be said that the bill is void by force of the 29th section of the 7 & 8 Vict. c. 110, because Davis, one of the directors of the Sea Fire Life Assurance Society, who signed the bill, was also a director of the Port of London Company, and therefore "interested in the contract." That section enacts, amongst other things, that, "if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers), shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the stockholders, to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of the votes of the shareholders present at such meeting." The facts are these:—The plaintiffs effected a policy with The Port of London Company: a loss happened; and their claim was admitted: The Port of London Company transfer their business, with its liabilities, to The Sea Fire Life Assurance Society; and the latter company settle the claim by giving a bill. [COCKBURN, C. J.—Did the loss occur and

was the claim admitted before the amalgamation?] It would seem so, though that is left somewhat ambiguous. This is clearly not the case of a contract within that section. It is a contract made *by the company with strangers. It is a fallacy to say that Davis had [*620 such an interest as the statute contemplated. The validity of the deed professing to amalgamate these companies came under discussion before the Lords Justices on an appeal against a decision of Vice-Chancellor Stuart, in the case of *The Port of London Assurance Company, 5 De Gex, M'N. & G. 465*, and afterwards on appeal to the House of Lords in *Ernest v. Nicholls*, 6 House of Lords Cases 401, where it was held that there can be no remedy against a company registered under the 7 & 8 Vict. c. 110, on any contract in which a director of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed. There, the two companies were dealing with each other; and both must be taken to have been cognisant of all the circumstances. The House could not fail to see that Collingridge was acting altogether beyond the scope of his authority. The two cases, it is submitted, are manifestly distinguishable.

Bovill (with whom was *Garth*), contra. (a)—It is not *pro- [*621 posed to ask the court to overrule the decisions in *Ellison v. Collingridge*, 9 C. B. 570 (E. C. L. R. vol. 67), and *Allen v. The Sea Fire Life Assurance Company*, 9 C. B. 574: as to the form of the instrument, they are not to be distinguished. Nor is it proposed to ask the court to put a construction upon the 44th clause of the deed of settlement different from that which was put upon it in the case of *Gordon v. The Sea Fire Life Assurance Society*, 1 Hurlst. & N. 592.† [WILLES, J.—And by the Lords Justices in *Greenwood's Case*, 3 De Gex, M'N.

(a) The points marked for argument on the part of the defendants, were as follows:—

"1. That the instrument dated the 1st of November, 1849, upon which the declaration is founded, is not a bill of exchange.

"2. That the plaintiffs cannot recover upon the said instrument under the common counts, inasmuch as it is not an account stated with the company, nor is it an account stated in form: nor was there any consideration for it as between the plaintiffs and the society:

"3. That the directors of the society had no power by law to draw bills of exchange either under their deed of settlement or otherwise:

"4. That the 44th clause of the deed of settlement does not give the directors power to issue bills of exchange at all, or at any rate not in the form in which the said instrument is framed:

"5. That, even supposing the directors had power to issue bills of exchange, they could only do so for proper purposes, and for carrying on the proper business of the said society; and that the instrument in question was not so issued:

"6. That the consideration for the said instrument was a debt due to the plaintiffs (as they well knew) from the Port of London Company, and has nothing to do with the business of the Sea Fire Society:

"7. That the supposed deed of amalgamation of the two companies is utterly void, inasmuch as neither company had power to enter into such a deed; that, even if such a power existed, it was not properly exercised; that the persons professing to act in the execution of the deed were legally disqualified from so acting; and that the said deed has been pronounced by the House of Lords to be absolutely void: see *Ernest v. Nicholls*, 6 House of Lords Cases 301:

"8. That the said Alexander Davis was disqualified from acting as a director in making the said alleged bill of exchange, inasmuch as, being a member of the Port of London Company, as well as a director of the Sea Fire Society, he was directly interested in the making of such bill: see the 7 & 8 Vict. c. 110, s. 29:

"9. That, at the time of the making of the said alleged bill, the said Sea Fire Society was solvent, and the said Port of London Company was insolvent; and therefore the said Alexander Davis had a direct interest in transferring his liability as a member of the Port of London Company to the Sea Fire Society."

*622] & G. 459.] The Lords Justices do not profess to *decide the question. The first point meant to be insisted upon on this occasion, is, that the only power to issue bills and notes given to the directors of the Sea Fire Life Assurance Society by the deed of settlement, is, to issue them *for the purposes of the company*, and that the bill in question was not issued for any legitimate purpose of this company. The bill was issued by Davis to the plaintiffs in satisfaction of a debt due from Davis to the plaintiffs. Davis, therefore, was a person interested in the contract within the 29th section of the 7 & 8 Vict. c. 110, and the contract, not having been attended with the formalities prescribed by that section, was not binding on the shareholders. As between the plaintiffs and the Sea Fire Life Assurance Society, there was no consideration for the giving of the bill: and this defence is open to the defendants under the plea denying the making of the bill: *Jones v. Corbett*, 2 Q. B. 828, 2 Gale & D. 308. The bill was not drawn for the purposes of the Sea Fire Life Assurance Society. Under the deed of settlement, the powers of the directors are defined. [COCKBURN, C. J.—I suppose we must assume that there was no authority to amalgamate the two companies?] That is agreed. [COCKBURN, C. J.—The shareholders can only be liable in respect of bills which it was competent to the directors to draw. *Phipson*.—The bill in question was given in respect of a loss upon a policy. COCKBURN, C. J.—Upon a policy effected with another company. Suppose, there having been no attempt made to amalgamate, the directors of the one company, for sinister purposes, accepted bills for the other company—surely you would not contend that they could bind their shareholders. *Phipson*.—No. But, suppose the one company adopts a policy of another company—a matter which is within the ordinary scope of the business of an insurance society,—must they not take *the obligation with the benefit?

*623] WILLIAMS, J.—We know from the statements in the case, that the consideration for the giving of the bill was the so-called amalgamation. *Phipson*.—It is the usual course of business for insurance offices to take up and continue the policies effected in offices which cease to exist. WILLIAMS, J.—That may be a legitimate mode of doing business; but it is not what the parties have been doing here. COCKBURN, C. J.—An amalgamation was contemplated and attempted to be carried out. The bill in question was given as part of that arrangement. It turned out that the whole thing was *ultra vires*. The result is, that the directors have given a bill for a matter which was without the scope of their authority. I do not see how that is to be got over. If the act of the directors had been sanctioned and adopted by a general meeting of the shareholders, that might have been a different thing. But here, the directors, *proprio motu*, do an act which the shareholders think fit to repudiate, as they have a right to do. *Phipson*.—The directors having by the deed of settlement a general power to draw and accept bills, the person who takes the bill is not bound to look to the authority, though it would be otherwise if they had only a special and limited power. WILLES, J.—Every person dealing with the company is bound to know the contents of the company's deed of settlement: *The Royal British Bank v. Turquand*, 5 Ellis & B. 248 (E. C. L. R. vol. 85), 6 Ellis & B. 327 (E. C. L. R. vol. 88). COCKBURN, C. J.—If it were

otherwise, the deed would be wholly useless for the purpose of controlling the acts of the directors.]

COCKBURN, C. J.—I am of opinion that our judgment in this case must be for the defendants. It is conceded by Mr. *Phipson*, that, looking to the terms of the deed of settlement of the Sea Fire Life Assurance Society, *there was no authority in the directors to make the bill upon which the action is brought: but it is con- [*624 tended, that, notwithstanding such absence of authority in the directors, the plaintiffs not being aware of the want of authority when they took the bill, they are entitled to treat it as if it were a bill issued by one partner assuming to exercise his ordinary authority, which, though issued in fraud of his copartners, would nevertheless be good in the hands of a bona fide holder for value without notice. But there is this plain and manifest distinction between the case thus put and the present, viz., that there the party taking the bill would have nothing to lead him to believe that it was drawn or accepted for other than partnership purposes; whereas, here, the bill was taken by the plaintiffs in discharge of a liability in respect of which they knew it was not within the ordinary scope of the powers of the directors of the Sea Fire Life Assurance Society to draw a bill. Their authority to draw or accept bills is limited and regulated by the deed of settlement under which the society was constituted, to which all the world could have access. The case of *The Royal British Bank v. Turquand*, 5 Ellis & B. 248 (E. C. L. R. vol. 85), 6 Ellis & B. 327 (E. C. L. R. vol. 88), shows that the plaintiffs must be assumed to have knowledge of a deed of this description. The court of error in that case, in giving judgment affirming that of the Court of Queen's Bench, distinctly say, that "parties dealing with the directors of these joint stock companies are bound to read the deed or statute limiting the directors' authority." Having no power under the deed of settlement of the society to draw bills for the purpose for which this bill was drawn, they could not by their act bind the funds of the society.

WILLIAMS, J.—I am of the same opinion. The case *depends [*625 upon two questions,—one, whether the directors of the Sea Fire Life Assurance Society, when they drew this bill, had authority to draw it so as to bind the funds of the Society,—the other, whether, supposing them to have had no authority, whether the plaintiffs knew or had the means of knowing of such want of authority. With respect to the first question, it is clear from the facts stated in the special case, and from the course of the argument, that, unless such power was conferred upon them by the 44th clause of the deed of settlement, the directors had no authority to draw bills other than in furtherance of the ordinary business of the society. Now, the authority given to the directors by the 44th clause is, to make and issue, endorse, and accept bills and notes for the purposes of the society, not in satisfaction of the liabilities of any other company. The amalgamation of the Port of London Company with the Sea Fire Life Assurance Society was void, having been made without the consent of the general body of shareholders of each: consequently, the bill in question was not drawn for a purpose which was within the scope of the authority of the directors. As to the second question, I think the plaintiffs must be taken to have had notice of the absence of authority on the part of the directors when they took

the bill. They are bound, according to the authorities, to know of the existence and of the contents of the deed of settlement: and they knew they were taking from the directors of the Sea Fire Life Assurance Society a bill in satisfaction of a claim which they had against the directors of another company.

CROWDER, J.—I am of the same opinion. I think the bill was drawn without authority. It is contended on the part of the plaintiffs that the *626] general words of the *44th clause of the deed of settlement gave the directors authority to make and issue bills in the name and on account of the company. But we must take the whole of the deed together: and, looking at the general scope of the deed, I think it cannot be doubted that the power given to the directors by the 44th clause was only to make and issue bills for the business of the company. It is clear, therefore, that this bill was drawn without authority. If that were not so, this consequence would follow, that, although the amalgamation with the other company was illegal and void because the general body did not assent to it, yet the directors, having amalgamated the two companies without authority, might still do all that was necessary to carry out such amalgamation; which would be manifestly absurd. As to whether the plaintiffs were bound to know that the bill was unauthorized,—it appears that they took it in satisfaction of a claim they had upon another company; and it is laid down by Parke, B., in *Ridley v. The Plymouth Grinding and Baking Company*, 2 Exch. 711,† that persons dealing with joint stock companies are bound to take notice of the powers conferred upon the directors by the deed of settlement. He says: “The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of such a joint stock company until a copy of their deed of settlement shall have been delivered to the registrar of joint-companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are: and any person may find in the deed the duties of the directors and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority.”

*627] *WILLES, J.—I also am of opinion that our judgment must be for the defendants. The plaintiffs take a bill which is drawn by procuration. Unless, therefore, the person sought to be made liable upon it authorized its drawing, the plaintiffs cannot recover. One might conceive that a case might have arisen which might have been more favourable to the plaintiffs: it might have been that the plaintiffs had advanced their money upon a bill which the directors had represented themselves to have authority on behalf of the company to draw. This, however, is not a case of that sort, but the bare case of one taking a bill from company A. in respect of a debt due from company B., there being nothing in the deed (which must be taken to have been known to the plaintiffs) to confer upon the directors authority to make it.

Judgment for the defendants.

Notwithstanding the latitude which obtains in this country in the enforcement of contracts of corporations, where within the general scope of their statutory authority (see note to *Dock Co. v. Sinnott*, 8 Ell. & Bl. 352),

the English doctrine that the contracts of corporations beyond or contrary to that statutory authority are entirely void, so that they cannot be enforced even against them, has been followed in several American decisions of the highest standing: *Steam Navigation Co. v. Dandridge*, 8 Gill & Johns. 248; *Abbott v. Balt. & Rapp. Steam Packet Co.*, 1 Maryl. Ch. 542; *Hood v. New York & N. H. Railroad Co.*, 22 Conn. 502; *Pearce v. Madison, &c., Railroad Co.*, 21 Howard 442; see *Platt v. N. Y. & Bost. Railroad Co.*, 26 Conn. 670; *Waterman's Appeal*, Id. 108; *Brady v. The Mayor, &c.*, 2 Bosworth 513. In *Pearce v. Madison, &c., Railroad Co.*, a similar point to that decided in the text arose. Two connecting railroads, without any lawful authority, consolidated themselves by agreement into one, under a single management, and pending this illicit union, undertook to run a line of steamboats as a part of the joint business, for which the charter

of neither afforded any justification. The assignee of certain notes given for the price of one of these illegitimate steamers, brought suit against the corporations thereon, and it was held that he was not entitled to recover, by reason of the contract being *ultra vires*. The case of *Hood v. N. Y. & N. H. Railroad Co.*, 22 Conn. 502, is a peculiarly strong one, for it shows that no amount of acquiescence on the part of the stockholders can be relied on as validating a contract which is beyond the statutory powers of the company. It is possible, however, that the principle of these cases may undergo considerable discussion before it is finally domesticated in the United States. In fact its logic is more satisfactory than its justice. It seems to bear an unfortunate resemblance to the early doctrine that a corporation was never liable in tort, because, being merely a creature of the law, it could not, from its very constitution, do an unlawful act.

NEWTON and Others v. CUBITT and Others. Jan. 29.

In an action for an evasion of the plaintiffs' ancient ferry, by carrying passengers across the river near thereto,—the court refused to allow the defendants to add a plea alleging a variety of circumstances to show, that, from the altered state of the neighbourhood, public convenience required that which the defendants had done,—holding that the plea was clearly bad, and at the most amounted to a plea of not guilty.

THIS was an action for an alleged disturbance of the plaintiffs' ferry.

The second count of the declaration stated, that the plaintiffs, before and at the time of the committing of the grievances thereafter mentioned, had been and still were possessed of a certain ancient ferry, called Potter's Ferry, for the carriage and conveyance of foot-passengers, and goods belonging to such foot-passengers, across and over the river Thames, from the *Isle of Dogs, in the parish of St. Dunstan, Stebonheath, in the county of Middlesex, to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers over and across such ferry in any boat or boats kept by or by the authority of the plaintiffs for that purpose certain reasonable freights and ferriages; nevertheless the defendants, knowing the premises, but contriving to injure and disturb the plaintiffs in the peaceable and legal enjoyment of the said ferry, on divers days and times before the commencement of this suit, whilst the plaintiffs were so entitled, wrongfully, unlawfully, and for the purpose of evading the plaintiffs'

ancient ferry, and against the will of the plaintiffs, carried and conveyed, in a certain boat of the defendants, divers foot-passengers for hire over and across the said river Thames, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry of the plaintiffs, whereby the plaintiffs had lost divers profits which otherwise would have arisen to them from the enjoyment of the said ferry, and had been and were disturbed in the possession thereof and in their right therein.

To this count the defendants pleaded not guilty, and a traverse of the plaintiffs' possession of the ferry; and on a former day in this term,

Lush obtained a rule nisi to add the following:—

“And for a fourth plea, the defendants, as to the said second count, say, that the said ferry in the declaration mentioned was and is an ancient ferry, from a certain public landing-place in the said Isle of Dogs, over and across a certain public navigable river, to wit, the said river Thames, to Greenwich, in the county of Kent; that the said public landing-place *629] in the said Isle of Dogs leads to and communicates with a certain public highway in the said Isle of Dogs, which said public highway did at the time of the grant of the said ferry, and long before the said grievances, or any of them, lead to a certain ancient vill called Poplar, in the said Isle of Dogs; that there never was nor is any landing-place in the said Isle of Dogs connected with or belonging to the said ferry other than the said public landing-place above in this plea mentioned; that the said Isle of Dogs, except a small portion thereof on the north side thereof, was at the time of the grant of the said ferry bounded by the said river Thames; that the said Isle of Dogs, except the said vill of Poplar, was, at the time of the grant of the said ferry, and from thence for many years, uninhabited, and the only public highway therein was the said public highway leading from the said landing-place to Poplar as aforesaid; that the said Isle of Dogs on the east side of the said landing-place and of the said public highway continued so uninhabited until the same was built upon as thereafter mentioned, the said part of the said Isle of Dogs consisting of marsh land used only for the grazing of cattle; that, within the last few years, and long after the grant of the said ferry, and before the committing of the alleged grievances, a certain part of the said marsh on the east side of the said landing-place and of the said highway, was drained and embanked, and houses, warehouses, factories, and a church were built and are still standing thereon; and the said houses, warehouses, and factories became and were and still are occupied and inhabited, and an entirely new town and neighbourhood have sprung up there; that many of the said buildings of the said new town and neighbourhood were and are adjacent to the banks of the said river Thames, and the only convenient means of access to the other side of the said river for the inhabitants of the said new town and neighbourhood, and *persons *630] having occasion to go and return therefrom, is, by proceeding from a pier across the said river Thames; that it was and is necessary for the inhabitants of the said new town and neighbourhood that a pier should be constructed, and means of passage across the said river from the said new town and neighbourhood be provided; that a pier has been constructed in the said new town, distant, to wit, three quarters of a mile, from the said landing-place of the plaintiffs, and to and from which

pier a steamboat of the defendants has been accustomed to run across the said river, for the convenience of the inhabitants of the said new town and neighbourhood; that such pier has been constructed, and such steamboat worked and used, *bonâ fide* for the convenience of the inhabitants of the said new town and neighbourhood, and persons resorting thereto, and not with the intention of infringing or evading the said right of ferry in the declaration mentioned; and that the said conveyance by the defendants of the said inhabitants and other persons from the said pier to Greenwich, was and is the carriage and conveyance by the defendants in the declaration mentioned, whereof the plaintiffs have above complained."

Pigott, Serjt., showed cause.—If the proposed plea be worth anything, it amounts only to not guilty. There is, therefore, no pretence for asking to have it put upon the record. Its only object can be to raise an immaterial issue, and so prejudice the plaintiffs' case with the jury. The count is almost identical with that which was held good in *Blacketer v. Gillett*, 9 C. B. 26 (E. C. L. R. vol. 67). [*COCKBURN*, C. J.—The proposed plea rather looks like an argumentative traverse of the plaintiffs' right to a ferry at that place. *WILLIAMS*, J.—If put as a plea of insufficient accommodation, it might possibly be a good plea: *The Islington Market Bill*, 3 Clark & F. 513. *Here, admitting the invasion of the ferry, the defendants say that the convenience of the public [*631 requires it. That clearly is a bad plea.]

Lush, in support of the rule.—The substance of the plea is, that the acts complained of by the plaintiffs are justified by the insufficiency of the accommodation afforded by them to the public. [*CROWDER*, J.—You do not in terms allege want of sufficient accommodation.] The declaration does not state that what was done by the defendants was in fraud of the plaintiffs' rights. [*WILLIAMS*, J.—The allegation is substantially the same as in *Blacketer v. Gillett*, 9 C. B. 26 (E. C. L. R. vol. 67).] The question whether the facts stated in the plea afford the defendants any justification, must arise after the trial, and therefore it was thought more convenient if it could at once be put upon the record.

COCKBURN, C. J.—I think this plea, being objected to, cannot be allowed, inasmuch as, if the matters therein alleged amount to a defence at all, they may be given in evidence under not guilty. The count alleges that the plaintiffs are possessed of an ancient ferry, and that the defendants, knowing the premises, but contriving to injure and disturb the plaintiffs in the peaceable and legal enjoyment of the said ferry, wrongfully and unlawfully, and for the purpose of evading the plaintiffs' ancient ferry, carried passengers for hire over and across the river near to the part where the plaintiffs' ferry was, and so disturbed them. The defendants propose by the plea which they seek to plead to show that the plaintiffs have not a right to an exclusive ferry, because a new state of things has arisen, to which that right is not applicable. If that be so, if the defence amounts to anything at all, it may be *proved under not guilty. I do not see how the defendants can be pre- [*632 judged by our refusal to allow the proposed plea.

The rest of the court concurring, Rule discharged, with costs.

SMITH v. MANNERS and Another. Jan. 24.

To a common indebitatus count, the defendants pleaded, as to 10*l.*, parcel, &c., that they were always ready and willing to pay the same, and before suit tendered and offered to the plaintiff to pay the same, &c.

Replication, that the said sum of 10*l.* brought into court by the defendants was not sufficient to satisfy the claim of the plaintiff in respect of the matter to which the plea was pleaded:—
Held, that the replication was bad, and the plea good.

THE declaration contained a count for wrongful dismissal, a count for dismissal without notice, and a count for money payable by the defendants to the plaintiff for the work and labour, care, diligence, journeys, and attendances of the plaintiff by him done, performed, and bestowed as the traveller and collector for the defendants, and at their request, and for commission due and of right payable to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work and labour, for the defendants and at their request, and for money paid by the plaintiff for the use of the defendants at their request, and for money received by the defendants for the use of the plaintiff, and for wages of the plaintiff due from the defendants to the plaintiff as the hired servant of the defendants, and for money found to be due from the defendants to the plaintiff on accounts stated between them.

Seventh plea,—as to the third count of the declaration, except as to *633] 10*l.*, parcel of the money claimed *thereby, the defendants say they never were indebted as alleged.

Eighth plea,—and for a further plea as to the said third count, except as to the said sum of 10*l.*, parcel, &c., the defendants say, that, before action, they satisfied and discharged the plaintiff's claim in the said third count mentioned, except as aforesaid, by payment.

Ninth plea,—and for a further plea to the said third count, except as to the said 10*l.*, parcel, &c., the defendants say that the plaintiff at the commencement of this suit was, and still is, indebted to the defendants in an amount equal to the plaintiff's claim in the said count mentioned, except as aforesaid, for money payable by the plaintiff to the defendants for money lent by the defendants to the plaintiff, and for money received by the plaintiff for the use of the defendants, and for money paid by the defendants for the plaintiff at his request, and for money found to be due from the plaintiff to the defendants on accounts stated between them, which amount the defendants are willing to set off against the plaintiff's claim in the said third count mentioned, except as aforesaid.

Tenth plea,—and as to the said sum of 10*l.*, parcel, &c., the defendants say that they were always ready and willing to pay the same, and that before suit they tendered and offered to the plaintiff to pay the same to him, but he refused to receive it; and the defendants bring into court the said sum of 10*l.*, ready to be paid to the plaintiff.

Second replication to the tenth plea,—and for a second replication as to the tenth plea of the defendants, the plaintiff says that the said sum of 10*l.* brought into court by the defendants is not sufficient to satisfy the claim of the plaintiff in respect of the matter to which the said tenth plea is pleaded.

*634] Demurrer, the ground stated in the margin being *that the plea contains no allegation as to the 10*l.* being sufficient to

satisfy 10*l.*; and the replication tenders an issue of immaterial matter, 10*l.* being in fact sufficient to satisfy 10*l.*” Joinder.

Phipson, in support of the demurrer.(a)—The replication is no answer to the plea. [WILLES, J.—The replication is clearly a bad replication to a plea of tender.]

Grant, contra.(b)—Assuming the replication to be bad, the tenth plea cannot be supported: it alleges merely a tender before suit, whereas, to be a good plea, it should have alleged a tender on the day the debt became due. [WILLES, J.—Tout temps prist is the ordinary form of a plea of tender. The plea of tender assumes that a debt is due generally. When a man professes that he was always ready to pay, he admits that there existed a debt which he was bound to pay.] In *Dixon v. Clark*, 5 C. B. 365 (E. C. L. R. vol. 57), 5 D. & L. 155, where the subject was much discussed, Wilde, C. J., says: “Besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain, that, where, by the terms of it, the money is to be paid on a future day certain, this branch of the plea can only be *satisfied by alleging a tender *on the very day*. And this is the [*635 principle of the decisions of *Hume v. Peploe*, 8 East 168, and *Poole v. Tumbridge*, 2 M. & W. 223.† It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist*. Consequently, a plea by the acceptor of a bill, or the maker of a note, of a tender *post diem*, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always *ready* to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*), but also from the time when the bill or note became payable.” [WILLES, J.—If the plaintiff intended to rely upon this being a debt payable on a particular day, he ought to have replied it. It is not unlike the case of an action for a negligent or a voluntary escape, where the replication usually alleges that the defendant of his own wrong permitted the escape: see a form, 3 Chitty on Pleading, 7th edit., by Greening, 466.] The debtor is bound to pay his debt the moment the debt is due. It is no answer for him to say he was always ready and willing to pay it.

Phipson.—In *Dixon v. Clark*, 5 C. B. 365 (E. C. L. R. vol. 57), 5 D. & L. 155, the point was raised by the replication.

COCKBURN, C. J.—This is a plea of tender in the common and ordinary form, pleaded to a general *indebitatus* count: and, though there may be some debts to which it would not be a good answer, there is nothing to show that that is so here. If the debt to which it is pleaded had been a debt payable on a particular day, the plaintiff should have replied it. I think our judgment must be for the defendants.

(a) The points marked for argument on the part of the defendants, were as follows:—

“1. That it is no answer to a plea of tender to a specific sum of 10*l.*, that 10*l.* is not sufficient to satisfy 10*l.* 2. That the replication tenders an immaterial issue, and is no answer to the plea. 3. That it should have shown in what respect or how the 10*l.* tendered was not sufficient.”

(b) The points marked for argument on the part of the plaintiff, were as follows:—

“1. That the replication is a sufficient answer to the tenth plea. 2. That the objection to the replication is merely one of form.”

*636] *WILLIAMS, J.—I have looked and listened in vain to discover what objection can be made to this plea. It is in the form which has been in use for centuries. The plea of tender only bars the damages. Unless it appears that the money was payable on some particular day, and therefore that the defendant has been guilty of a breach of contract, it clearly is a good answer to the action. In *Johnson v. Clay*, 7 Taunt. 486 (E. C. L. R. vol. 2), where, in covenant for rent, the defendant pleaded a tender, it was contended that a plea of tender after the day, in covenant for the payment of money, was bad: but Gibbs, C. J., said: "I should be sorry that it should be doubted for a moment, that, where there is a mere dry covenant for payment of money, it may not be tendered. Suppose a covenant for rent, and three or four quarters due, it might always be said that an action had accrued." And Burrough, J., said: "A tender always admits the cause of action: it only goes in bar of damages." The count here being general, there is nothing to show that the sum tendered does not constitute the entire debt.

CROWDER, J., and WILLES, J., concurred.

Judgment for the defendants.

*637] *BAGGALLAY and Others v. PETTIT and Others. Jan. 24.

By an agreement between the plaintiffs of the first part and the defendants of the second part, the former agreed, that upon payment to them by the latter of 1440*l.* by instalments on certain days, they would grant the defendants a lease of a certain parcel of land; and the defendants agreed to accept such lease and execute a counterpart thereof. A declaration, after setting out the agreement verbatim,—alleged that all things and conditions had happened and had by the plaintiffs been observed and performed which were necessary to entitle them to be paid by the defendants the several sums on the days named, and that the said several days had elapsed before the suit; and assigned for breach non-payment of the moneys or any part thereof:—Held, that the declaration disclosed a sufficient cause of action,—the granting of the lease not being a condition precedent to the plaintiffs' right to demand payment of the money.

THE declaration stated that an agreement was theretofore made by and between the plaintiffs of the first part, and the defendants of the second part, which said agreement is signed by the plaintiffs and the defendants, and is in the words and figures following, that is to say,—
 "Memorandum of agreement made this 4th day of August, 1856, between R. Baggallay, of, &c., C. S. Butler, of, &c., and J. H. Wilson, of, &c., for themselves, their heirs and assigns (hereinafter called the parties of the first part), of the first part, and W. Pettit, of, &c., G. T. Smith, of, &c., J. W. Legge, of, &c., C. Hack, of, &c., C. T. Smith, of, &c., and J. J. Burton, of, &c., (hereinafter called the parties of the second part), of the second part: Whereas, the parties hereto of the first part have agreed to allow the parties hereto of the second part, out of the purchase-money of 1560*l.*, the sum of 120*l.* for completing the messuages hereinafter described; and the said parties of the first part agree, that, upon payment to them by the said parties hereto of the second part of the sum of 1440*l.* and interest in manner hereinafter mentioned, that is to say, 40*l.* on the 24th of February next, 50*l.* on the 25th of March next, 50*l.* on the 24th of June, 1857, and 1300*l.*, being the balance of the said purchase-money, on the 29th of September,

1857, with interest at the rate of 5*l.* per cent. per annum on the same sums respectively, they will grant to the said parties of the second part a lease of all that piece or parcel of land or ground situate, lying, and being at Rhodeswell, in the parish of St. Dunstan, *Stepney, in the county of Middlesex, on the east side of the road called [*638 St. Ann's Road, with the thirteen messuages, or tenements and premises thereon erected and built, and which said piece of land and premises, with the abutments and boundaries thereof, are more particularly described at the foot hereof, and therein coloured pink, to hold the same from the 29th of September, 1857, for the term of ninety-nine years, at the yearly rent of 3*l.* 14*s.* 6*d.* for each of the said messuages and premises, to be paid quarterly, on the usual quarter-days in every year, clear of all deductions for sewers-rate and all other outgoings whatsoever, the land-tax, which has been redeemed, tithes, or rent-charge in lieu of tithes, and the property-tax, only excepted,—the first quarterly payment to be made on the 25th of December, 1857. The said parties of the second part also agree to accept such lease or leases, and execute a counterpart or counterparts thereof, and to pay the solicitors of the said parties hereto of the first part the sum of 8*l.* 8*s.* for preparing every such lease and counterpart, exclusive of the advalorem duty, but inclusive of maps or plans drawn thereon. And the said parties hereto of the first and second parts respectively mutually agree that such lease shall contain all such covenants, clauses, and agreements as are mentioned and set forth in the draft of a lease already prepared, approved, and signed by or on the part of the said parties of the second part. Provided, and it is hereby agreed between the said parties, that, if the said parties of the second part shall require a lease of any one or more of the said thirteen messuages (not being one lease for the entirety of the said premises), then and in that case the said parties of the first part agree to grant to the said parties of the second part, or to any other person or persons they may direct, such one or more leases; in which case, *each of such leases lastly mentioned shall contain the same [*639 covenants, clauses, and agreements as are hereinbefore provided in respect of the lease of the entirety of the said premises: and that the production of the title of the said parties of the first part, or any title whatsoever to grant such lease, shall not be required by the said parties of the second part:" Averment, that the plaintiffs are the same persons who were and are the parties to the said memorandum of agreement of the first part; and that the defendants are the same persons who were and are the parties thereto of the second part: And that all things and conditions have happened, and have by the plaintiffs been observed and performed, which were necessary to entitle them to be paid by the defendants the said sum of 40*l.* on the 24th of February next after the making of the said agreement, and the said sum of 50*l.* on the said 25th of March then next, and the said sum of 50*l.* on the 24th of June, 1857, and the said sum of 1300*l.*, being the balance of the said purchase-money, on the 29th of September, 1857, with interest at the rate of 5*l.* per cent. per annum; and the said several days had elapsed long before this suit: yet the defendants had made default in paying to the plaintiffs the said sums of 40*l.*, 50*l.*, 50*l.*, and 1300*l.*, or any of them, or any part thereof, or any interest thereon; and the said

sums, and a large sum for the said interest, was due and payable by the defendants to the plaintiffs.

To this declaration the defendants demurred,—the ground of demurrer alleged in the margin being, “that the declaration shows no agreement or promise by the defendants to pay the moneys claimed.” Joinder.

Gray, in the support of the demurrer.—The question is, whether, upon the true construction of the agreement declared on, the grant of *640] the lease is not a *condition precedent to the right of the plaintiffs to demand payment of the several sums therein mentioned. This is not simply a covenant to pay money. [COCKBURN, C. J.—The plaintiffs agree that they will grant a lease to the defendants upon their paying them certain sums, and the defendants agree to accept the lease and to execute a counterpart. Is not that an agreement to take the lease with the condition of paying the money?] The breach assigned is, simply the non-payment of the money. The question is, whether upon the agreement as set out in the declaration there is a covenant to pay the money. It is submitted that there is not. [WILLIAMS, J.—We do not know the facts: but, must we not assume that the lease has been granted?] No lease has been tendered; nor have the defendants refused to accept a lease. [COCKBURN, C. J.—Then, you should have traversed the general allegation that all things and conditions had happened and been performed to entitle the plaintiffs to be paid the several sums. WILLES, J.—If the lease has not been granted, but has been tendered, the vendors are not entitled to the price, but only to damages for not performing the contract. The estate remains in the vendors, until the lease is actually granted. In *Sibthorp v. Brunel*, 8 Exch. 826,† a deed executed by the plaintiff and defendant,—after reciting that a company had been formed for the purpose of constructing a railway which would pass through the plaintiff’s estate, and that an application to parliament for an act of incorporation was then pending,—contained a covenant by the defendant, that, within six months from the time of the passing the proposed bill, and before the company should enter upon, take, or use the estate, except for the purpose of setting out and ascertaining the land required, the defendant should pay to the *641] plaintiff the sum of 4000*l.* for the purchase of the *estate as thereafter described. There was also a covenant, that, on payment by the defendant of the said sum of 4000*l.* and interest after the expiration of six months after the passing of the said bill to the day of payment of the said sum, the plaintiff should convey to the defendant so much of the estate as should be required for the construction of the railway. In an action on the covenant, for the non-payment of the purchase-money after six months from the passing of the bill, it was held that the covenant to pay the purchase-money, and that to convey the property, were independent covenants.]

Bovill, Q. C., *contra*, was not called upon.(a)

COCKBURN, C. J.—We think the declaration is good, and conse-

(a) The points marked for argument on the part of the plaintiffs, were,—“That, on the true construction of the whole agreement, which is set out in the declaration verbatim, there is an express, or at any rate an implied promise to pay the sums of 40*l.*, 50*l.*, 50*l.*, and 1300*l.*: That the grant of a lease was not a condition precedent to the right to be paid the said sums, at any rate the first three of them, which were to be paid on days anterior to the granting the lease: And that, if the defendants relied on the non-granting of the lease, or the non-observance of any condition, they ought to have pleaded the defence specially.”

quently that the plaintiffs must have judgment upon this demurrer. But, if the defendants wish to withdraw the demurrer, and traverse the general averment, they may apply for leave to amend. If no application for that purpose be made at Chambers within a week, there will be judgment for the plaintiffs. Rule accordingly.

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*CHOPE and Another v. REYNOLDS. Jan. 24. [*642

Where "profits" are insured against perils of the sea, the liability of the underwriters does not attach unless the goods themselves are lost by a peril insured against.

A. bought goods of B., to arrive at Bristol by the ship *James Daly*, from the west coast of Africa, and effected an assurance with C. against the ordinary perils, with a memorandum endorsed on the policy, declaring the insurance to be "on profit on palm oil, valued at, &c., per *James Daly*." The *James Daly*, while on her voyage to Bristol with the oil on board, was lost by a peril insured against, but the oil was brought home undamaged by another vessel, and was sold by B. to a third person:—Held, upon the authority of *The Royal Exchange Assurance v. M'Swiney*, 14 Q. B. 646 (E. C. L. R. vol. 68), that there had been no such loss of the subject-matter of insurance as was contemplated by the policy.

THIS was an action upon a policy of insurance on "profits" for a total loss.

The declaration stated, that, before the making of the policy of insurance thereafter mentioned, certain persons carrying on business under the firm of R. & W. King bargained and sold to the plaintiffs divers tons of palm oil, at a certain rate or price then agreed upon between the said persons and the plaintiffs, to arrive by certain ships, to wit, the *James Daly* and other ships, at the port in the said policy of insurance, and thereinbefore mentioned, which said ships before the making of the bargain and sale had been and were engaged upon a trading voyage to and from the West coast of Africa for the said Messrs. R. & W. King, and were expected to arrive at Bristol, or some port or ports of discharge in the united kingdom, with cargoes on board thereof respectively comprised, amongst other things, of palm oil; and that, at the time of the said bargain and sale, and of the making of the said policy of insurance, the plaintiffs had reason to expect that they would make great gains and profits, to the amount of the sum insured as thereafter mentioned, in case the said tons of palm oil so bargained and sold as aforesaid should arrive by the said ships: That, after the said bargain and sale, the defendant, in consideration of 31*l.* 10*s.* then paid to him by the agents of the plaintiffs in that behalf thereafter mentioned, as and for the premium and at and after the rate of three guineas per cent. for the insurance of 1000*l.* upon the premises mentioned in the policy therein-after mentioned, became and was *an insurer to the plaintiffs of 1000*l.* upon the said premises, and as such insurer for the said [*643 sum subscribed on the 12th of February 1857, a certain policy of insurance caused to be made on the 11th of February aforesaid by certain agents of the plaintiffs in that behalf carrying on business under the firm of Bushbys & Lee, purporting thereby and containing therein that the said persons carrying on business under the firm of Bushbys & Lee, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance and cause themselves

and them and every one of them, to be insured, lost or not lost, at and from the West coast of Africa, during the vessel's stay and trade there, and from thence to Bristol or any port or ports of discharge in the united kingdom, and with liberty to proceed in any rotation to all or any ports or places, rivers, or islands of Africa, including Madeira, Canaries, Cape de Verde, and the islands in the Atlantic, or off the coast of Africa, for the purposes of trading, bartering, and exchanging property, for information or refreshment, or for any other purposes of trade whatsoever, without being deemed any deviation, and with liberty to be towed by steam vessel or vessels, and to dock, heave down, to load, unload, or reload, to sell, barter, or exchange all or either goods or property with any ships, boats, craft, or factories wheresoever they may call at and proceed to, and also with liberty to take on board and land passengers without being deemed any deviation, without prejudice to that insurance, including all sorts of craft, trading and unloading, reloading, and trans-shipment, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munitions, artillery, boat, and other furniture of and in the good ship or vessel

*644] called the ships named, whereof *was master under God for this present voyage, &c., or whosoever else should go for master in the said ship, or by whatever other name or names the same ship, or the master thereof, was or should be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, upon the said ship, &c., and so thence continue and endure during her abode there, upon the said ship, &c., and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever, should be arrived at as above; upon the said ship, &c., until she should be moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same should be there discharged and safely landed: and it should be lawful for the said ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and theresoever for any purposes, being deemed no deviation from and without prejudice to that insurance: the said ship, &c., goods and merchandises, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at as under. Touching the adventures and perils which they the assurers were contented to bear and did take upon them in that voyage, they were of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainment of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof; and, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, *645] *labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to that insurance, to the charges whereof they the assurers would contribute each one according to the rate and quantity of his sum therein assured: And it was agreed by them the insurers that that writing or policy of assurance should be of as

much force and effect as the surest writing or policy of assurance theretofore made in Lombard Street or in the Royal Exchange or elsewhere in London; and so they the assurers were contented, and did thereby promise and bind themselves each one for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that insurance by the assured, at and after the rate of three guineas per cent. In witness whereof they the assurers did subscribe their names and sums assured, in London, the 11th of February, 1857: And that by a certain memorandum thereon written, corn, salt, fruit, flour, and seed were warranted free from average unless general or the ship should be stranded; also sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5l. per cent.; and all other goods, and also the ship and freight, were warranted free from average under 3l. per cent. unless general or the ship should be stranded: And by a certain other memorandum written in the margin thereof, the said ships were warranted free of capture and seizure, and the consequences of any attempt thereat: And also by a certain other memorandum thereunder written it was declared that the said insurance was on profit on palm oil, valued at 3000l., by order of the plaintiffs, in respect of the ships whereof the names were thereunder written, and to the amount *of the sums set against the names [*646 of the said ships, being the same ships as engaged and so expected to arrive as thereinbefore mentioned; which said names and sums were and are as follows,—James Daly, 450l.; Chalco, 400l.; Warrior, 200l.; Glenely, 250l.; Packet, 450; Elizabeth Emily, 600l.; Dehomey, 200l.; Stedfast, 250l.; Arab, 100l.; Jane Black, 100l.,—as by the said policy of insurance and memoranda, reference being had thereto, will more fully and at large appear: That, after the said ship called the James Daly had arrived at the West coast of Africa, and while she was prosecuting the voyage and trading as aforesaid, divers large quantities of palm oil were loaded and shipped, and thenceforward until the loss thereafter mentioned continued on board the said vessel for and on account of the said R. & W. King, to be conveyed thence to Bristol, or some port of discharge in the united kingdom, for the said Messrs. R. & W. King, and from the time of such loading became and from thence until the loss thereafter mentioned were part of the palm oil so bargained and sold to the plaintiffs as aforesaid: That the plaintiffs were interested in the profits to arise and be made from the sale and disposal of the said palm oil, to wit, to the amount of all the money by them ever insured or caused to be insured thereon: That afterwards the said ship called the James Daly, during her stay on the West coast of Africa, and while she was endeavouring to prosecute her voyage from thence to Bristol aforesaid, or some port of discharge in the united kingdom, was, with the said palm oil on board thereof, by perils and dangers of the seas, utterly lost, and never did arrive at Bristol aforesaid, or any port of discharge in the united kingdom, whereby the expected profits of and from the sale of the said palm oil, which the plaintiffs averred that they might or could and would have made if the same had arrived at Bristol aforesaid, or *any port of discharge [*647 in the united kingdom, were lost to the plaintiffs: And that they the plaintiffs had done, and always been ready and willing to do, all

things on their part necessary to be done, and which they ought to be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle them to be paid by the defendant the said loss, and that a reasonable time for payment had elapsed, and the defendant had not paid the same.

Sixth plea—to the first count,—that the defendant became an insurer by a policy in writing, and not otherwise, which policy was in the words and figures following [setting out the policy, with the several memoranda endorsed thereon]: Averment, that the palm oil shipped on board the *James Daly* as in the first count mentioned, and in the profits whereof the plaintiffs were alleged to have been interested, was not, nor was any part of it, lost or damaged by perils of the sea or other perils insured against, and was safely shipped on board other vessels, and was disposed of by the said Messrs. R. & W. King.

Second replication to the sixth plea,—that, by the usage of trade, the plaintiffs were not, under their said contract, entitled to have the said palm oil, unless the same should arrive by the said *James Daly*, and that they did not have the same.

Demurrer thereto,—the ground stated in the margin being, “that the insurance is a contract to indemnify the assured against damage or loss to the palm oil on board the ship, and is not a contract to indemnify the assured against any loss arising from the ship not arriving with sufficient palm oil on board to entitle the assured to claim it.”

Blackburn, in support of the demurrer. (a)—The *question is, *648] what is the meaning of the contract between the underwriter and the plaintiffs? There is no averment on the record that the former had any notice of the contracts with Messrs. King: all they knew was, that the plaintiffs were desirous of insuring profits expected to be made on palm oil expected to arrive at Bristol from the West coast of Africa, in certain ships to be named. There can be no doubt as to the meaning of that. Where a man insures goods on a voyage, he is supposed to insure their value at the port of shipment. He may if he pleases further insure the profits of the venture. But in both cases the event is precisely the same. He does not insure the ship or the voyage: but he insures against the non-arrival of the goods at their destination by reason of a peril insured against. The event which happened here gave rise to no loss upon the goods themselves: all that is alleged, is, that the ship was lost. It is plain, upon the decision of the Exchequer Chamber, in *M'Swiney v. The Royal Exchange Assurance*, 14 Q. B. 646 (E. C. L. R. vol. 68), that this was not such a loss as the underwriter intended to indemnify the plaintiffs from. In that case, the plaintiff, in London, contracted to buy of D. 6000 bags of rice, to arrive from Madras by the ship *E. B.* before the end of May; and he contracted with W. to sell him

(a) The points marked for argument on the part of the defendant, were as follows:—

“That the contract between the underwriter and the plaintiffs, being contained in the written policy of insurance set out in the sixth plea, cannot be varied in its construction by the contracts between the plaintiffs and Messrs. R. & W. King, even if the defendant had at the time of the making of the policies known of these contracts, which is nowhere alleged: and that the policy in this case is ‘on profit on palm oil,’ and that, in the language of the judgment of the Court of Exchequer Chamber, in *The Royal Exchange Assurance Company v. M'Swiney*, 14 Q. B. 661 (E. C. L. R. vol. 68), the losses insured against by this policy are only the losses by the perils of the seas directly affecting the goods, and consequently the profits on the goods.”

*the same rice, to arrive as above, at an advanced price. The plaintiff then effected an insurance *at and from Madras to London, on profit on rice*, loaden or to be loaden, and also upon the body, tackle, &c., of the ship E. B., beginning the adventure upon the goods from and immediately after the loading thereof aboard the said ship at Madras: the ordinary perils were insured against: premium, 2l. 10s. per cent. The rice was already to be shipped on board the E. B., and conveyed to London for plaintiff's vendors, and 1200 bags were actually on board, when, by perils of the sea, the ship was disabled, and prevented from performing the voyage, and the rice on board spoiled: the plaintiff's contracts both of purchase and sale became inoperative. In an action on the policy for a total loss in respect of 4800 bags, the insurers having settled for the 1200, the Court of Queen's Bench held, that the plaintiff's expected profit was an insurable interest, and well insured by this policy; and that it was not necessary to the plaintiff's right of recovery that the 4800 bags should have been actually on board; the ship having been at Madras ready to take in the cargo, and having been disabled from so doing by no cause but peril of the sea. This judgment, however, was reversed by the Exchequer Chamber, who held that the plaintiff's interest in profit, though insurable, was not properly insured by a policy in this form, except as to the rice actually put on board; and that, if the rice on shore could have been considered a subject-matter of the insurance under this policy, the loss in respect of such rice was not occasioned by peril of the sea, within the meaning of the policy, but was only consequential upon other loss occasioned by such peril. The reasons given by Parke, B., in that case, p. 661, are closely in point here. "Upon the face of the policy," he says, "giving full effect to the written part of it, we think that the *plaintiff is to be considered in the same situation, as to the liability, as if he had insured the ordinary profits of a parcel of rice shipped on board the particular vessel, that is the additional value which it was expected to acquire at the termination of the voyage, and against the losses specified. If so, we think it clear that the policy attached only to such rice as was actually on board. The adventure begins on the said goods from and immediately after the loading on board: and we think the insurance on the profit or the additional value of the goods cannot begin at a different time; and, further, that the losses insured against by this policy are only the losses by perils of the seas directly affecting the goods, and consequently the profit on the goods." Unless the casualty be such as would have rendered an underwriter upon goods liable, the underwriter upon profits cannot be liable.

David Keane, contra.(a)—The decision of the Court of Queen's Bench in *M'Swiney v. The Royal Exchange Assurance*, 14 Q. B. 634 (E. C. L. R. vol. 68), is in favour of the plaintiffs, viz., that, under circumstances like those of this case, the policy attached. The extent

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

"1. That the replication answers the plea: 2. That the plea does not answer the declaration, and is bad in substance: 3. That the contract of insurance in this case is one to indemnify the assured against the loss by the perils insured against of the profits to arise from the arrival of the goods at the destined port of discharge by the ships named: 4. That the contract in this case is one to indemnify against any damage to or loss of the profits by reason of any of the perils insured against, and not merely against the particular damage to or loss of the profits which might result from the goods being damaged or lost on board the ship."

to which that judgment is reversed by the Exchequer Chamber, is, that
 *651] the risk does not commence until the goods are actually on board. The language of the judgment which is relied on by the other side, is applicable to a totally different state of facts. In *Anderson v. Wallis*, 2 M. & Selw. 240, 247, Lord Ellenborough says: "I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner, a total loss of cargo may be effected, not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage." [COCKBURN, C. J.—That was a case of insurance on goods, not on profits. The judgment of the Exchequer Chamber in *The Royal Exchange Assurance v. M'Swiney* goes the length of saying, that, unless there be direct bodily damage to the goods, there can be no loss of profit within the meaning of such a policy as this. WILLIAMS, J.—In *Halhead v. Young*, 6 Ellis & B. 312 (E. C. L. R. vol. 88), the case of *The Royal Exchange Assurance v. M'Swiney* was treated as having proceeded entirely on the ground that the policy never attached, the adventure had not begun. That case, however, did not turn exclusively on that. COCKBURN, C. J.—I think we must hold ourselves bound by the decision of the Exchequer Chamber in *The Royal Exchange Assurance v. M'Swiney*, though I must say I should not feel disposed to carry that case any further. There is one ground upon which that decision proceeded which is clearly applicable here.] The real point upon which it was there held that the assured was not entitled to recover, was, that the rice had not been shipped. That clearly is a good ratio decidendi. However important and instructive the other point thrown out may be, the court is not bound by it. [WILLIAMS, J.—Baron Parke says,—“The *652] adventure begins on the said goods *from and immediately after the loading on board: and we think the insurance on the profit or the additional value of the goods cannot begin at a different time; and, further, that the losses insured against by this policy are only the losses by perils of the seas directly affecting the goods and consequently the profit on the goods.”] What is the meaning of a loss by perils of the seas directly affecting the goods?

COCKBURN, C. J.—I think we cannot get over the decision of the Exchequer Chamber in *The Royal Exchange Assurance v. M'Swiney*. Two reasons are given for the judgment of the court, one of which is directly applicable to the case now before us. And, when we see that the court of error proceeded upon a principle, clearly enunciated, which necessarily involves the question we are dealing with, we must hold ourselves bound by it.

WILLES, J.—I may say that it was not by my advice that the case of *The Royal Exchange Assurance v. M'Swiney* did not go to the House of Lords.

Judgment for the defendant.

An insurance on profits is lawful in the United States, as in England; and in this country, is subject in general to the same rules which apply to an insurance on goods: *Loomis v. Shaw*, 2 Johns. Cas. 36; *Abbott v. Seber*, 3 Id. 39; *Tom v. Smith*, 3 Caines 245; *Mumford v. Hallett*, 1 Johns. 433; *Fosdick v. Norwich, & Co., Ins. Co.*, 3 Day 108; *Walu v. Thompson*, 9

Serg. & R. 115; Patapsco Ins. Co. v. Coulter, 3 Peters 222; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451. The most noticeable points presented by the American decisions, in respect to this head of insurance, are the following. The insurer on profits will be entitled to recover for a total loss, where the cargo is wholly lost by a peril insured against, without showing that he would have made any profit if the vessel had reached her destination: *Patapsco Insurance Co. v. Coulter*, *ut supra*. Where there is a warranty against particular average, a partial loss of the cargo, even exceeding fifty per cent., with an absence of profit on the whole cargo, though a profit on the part of the cargo saved, will not be within the policy, nor give a right to abandon as for a total loss: *Waln v. Thompson*, *ut supra*. Where there is insurance on both cargo and profits separately, an abandonment of the former will not interfere with the right to recover from the underwriters for a total loss in respect to the latter: *Mumford v. Hallett*, 1 Johns. 433.

***MORGAN and Others, Assignees of JAMES SEBASTIAN YEATS, deceased, a Bankrupt, v. TAYLOR. Jan. 24. [*658**

A solicitor, pending a suit in Chancery, received from A., his client, in 1846, his bill for costs already incurred, upon an agreement with A., to refund the amount to him in the event of his obtaining a decree for costs in the suit. A. became bankrupt in 1847, and shortly after obtained his certificate, and died. The suit proceeded (the assignees not interfering) and a decree was pronounced, under which the costs were awarded to A., and were received by the solicitor.

In an action against the solicitor by the assignees of A.,—Held, that the contingent right to have the amount advanced by him for costs repaid under the agreement (which was a valid agreement, and made upon a sufficient consideration), was an interest in A., which on his bankruptcy passed to his assignees; and consequently that the latter were entitled to recover the sum so paid by A. as money received to their use.

Quære, whether A. at the time of his bankruptcy had such an inchoate or contingent interest in the costs of the suit, *as such*, as would pass to his assignees?

By the decree, the solicitor, in addition to the sum paid to him by A. in 1846, received a further sum for costs due to a former solicitor in the suit:—Held, that the assignees were not entitled to recover this sum,—although it appeared that no claim had been made thereto by such former solicitor.

THIS was an action brought by the plaintiffs as assignees of James Sebastian Yeats, deceased, a bankrupt, against the defendant, for the recovery of 341*l.* 18*s.* 4*d.* alleged to be due by the defendant to the plaintiffs, as assignees, as money had and received by the defendant to the use of the plaintiffs, as assignees, under the following circumstances; and by consent, and by judge's order under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 42), the following case was stated for the opinion of the court, without pleadings:—

In the year 1835, the bankrupt, on behalf of himself and his infant children, who were annuitants under the will of James Yeats, deceased, instituted an administration suit in Chancery for the purpose of securing their annuities.

Mr. Fearon, of the then firm of Clutton & Fearon, solicitors, was the solicitor originally employed by the bankrupt in that suit, and he took certain proceedings therein: but the suit was allowed to slumber; and in the year 1843 the solicitor in the suit was changed, and the defendant then became solicitor therein for the bankrupt and his children in

lieu of Mr. Fearon, upon an understanding between Mr. Fearon and the defendant, that, when a taxation of the costs of the suit should be *654] directed by the court, the costs of Messrs. *Clutton & Fearon should be included, and the defendant should pay over to them such portion of the costs which he should receive as was due to them at the time of the aforesaid change of solicitors taking place.

Mr. Clutton, of the aforesaid firm of Clutton & Fearon, has since died.

The defendant has since prosecuted the suit as the solicitor on behalf of the said bankrupt and his children; and the same is still pending.

In the year 1846, the bankrupt, requiring a loan, applied to the defendant; and the defendant advanced to him the sum of 1380*l.* upon a mortgage by him and his two eldest children of the arrears then due to them in respect of the aforesaid annuities, and to which arrears the bankrupt was then entitled (the bankrupt being entitled to his children's annuities during their minorities, and his said children being then still infants): and after the said advance to the bankrupt of the said sum of 1380*l.* and out of the same moneys, the bankrupt paid to the defendant the bill of costs due to him up to that time, including in such payment the costs then incurred by the defendant in the said suit,—upon the understanding and agreement, that, if any portion of those costs were afterwards ordered to be paid in the suit, the defendant should pay back the amount he might receive to the bankrupt.

In November, 1847, the said James Sebastian Yeats became a bankrupt, and in the same year obtained his certificate. He died in the year 1857.

In the year 1856, an order was made in the suit, for the first time, for a taxation of the costs of all parties to the said suit; and, in July, 1857, an order was made for their payment.

The defendant by his agent and partner has since received his taxed *655] costs in the said suit, out of a fund *in the said Court of Chancery; and in the amount which he so received is included 282*l.* 7*s.* 11*d.*, being the amount paid to him by the bankrupt in 1846 as aforesaid; and the defendant has also received out of the said fund the amount of the taxed costs due to Messrs. Clutton & Fearon up to 1843, when Mr. Fearon ceased to be such solicitor in the said suit as aforesaid.

The last-mentioned amount is 59*l.* 10*s.* 5*d.*; but no part of that sum was included in the sum paid by the said James Sebastian Yeats to the defendant in the year 1846.

Mr. Fearon makes no claim against the defendant in respect of the said costs so due to the said Messrs. Clutton & Fearon as aforesaid.

The question for the opinion of the court, is,—whether the moneys so received by the defendant out of the Court of Chancery in respect of taxed costs as aforesaid, or any part thereof, belong to the plaintiffs as such assignees as aforesaid, and whether the plaintiffs, as such assignees as are entitled to recover the same, or any part thereof, in this action.

If the court shall be of opinion that the plaintiffs, as such assignees as aforesaid, are entitled to recover the said sum of 282*l.* 7*s.* 11*d.* and the said sum of 59*l.* 10*s.* 5*d.*, or either of those sums, or any part thereof, then judgment is to be entered up for the plaintiffs for the said

sum of 282*l.* 7*s.* 11*d.* and the said sum of 59*l.* 10*s.* 5*d.*, or so much of the said sums respectively as this court shall be of opinion that the plaintiffs, as such assignees as aforesaid, are entitled to recover.

If the court shall be of opinion that the plaintiffs, as such assignees as aforesaid, are not entitled to recover any part of the said several moneys respectively, then judgment shall be entered for the defendant.

Scotland (with whom was *Phipson*), for the *plaintiffs.(a)—
The whole sum of 341*l.* 18*s.* 4*d.* passed to the plaintiffs as assignees of Yeats, as a contingent right to *have repaid to him costs which he had disbursed before his bankruptcy. The moment the money came to the hands of the defendant, it became money had and received to the use of the assignees. Costs are in general payable to the client, irrespective of the attorney's claim: Archbold's Practice, 10th edit. 124. [The court called upon

Phear, for the defendant.(b)—There was no valid contract between the defendant and the bankrupt at the time of the payment of the money in 1846: it was without consideration. The attorney, having been paid his costs at the time they were incurred, has since the bankruptcy and certificate of his client received the amount under a decree made in the suit. Can it be said that the bankrupt had any right to

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

"The plaintiffs will contend, that they are entitled to recover the sum of 282*l.* 7*s.* 11*d.*, as a sum which accrued due from the defendant after the bankrupt obtained his certificate, upon an agreement made by the defendant with the bankrupt before his bankruptcy, the interest in which agreement passed to his assignees as part of his estate applicable to the payment of his debts; and that, when such sum was received by the defendant, it became assets of the bankrupt's estate, to which they were entitled for the benefit of his creditors, and in point of law must be considered as having been received by the defendant for their benefit:

"The plaintiffs will also contend that they are entitled to recover the sum of 59*l.* 10*s.* 5*d.* mentioned in the special case, on the ground that the costs in the chancery suit, for the payment of which an order was made as therein mentioned, were in point of law the costs of the bankrupt as plaintiff in that suit, and not the costs of his late attorneys, Messrs. Clutton & Fearon; and that, as such, they were under the said order payable to the bankrupt, and, when received by the defendant as his attorney, would, if no bankruptcy had happened, have been money received by the defendant for the bankrupt's use, and subject to any lien which the defendant, as solicitor in the suit, might have had upon them; that, as the defendant does not claim any such lien, the amount, being received after the bankruptcy and certificate of the bankrupt, must be considered as received for the benefit of his assignees, as a sum in which at the time of the bankruptcy the bankrupt had an existing interest, and to which he had an inchoate right, and which interest and right passed to the plaintiffs as part of his estate; and that this right of the plaintiffs as assignees is not interfered with by the arrangement made by Messrs. Clutton & Fearon with the defendant when the latter became the solicitor in the suit, inasmuch as Mr. Fearon, who now represents the firm of Clutton & Fearon, makes no claim to this sum, and it must therefore be taken that his claim for costs has been satisfied."

(b) The points marked for argument on the part of the defendant, were as follows:—

"1. That the plaintiffs as assignees are not entitled to recover the said sums of 282*l.* 7*s.* 11*d.*, and 59*l.* 10*s.* 5*d.*, or either of those sums, or any part thereof:

"2. That the said sums of 282*l.* 7*s.* 11*d.* and 59*l.* 10*s.* 5*d.* do not, nor does either of them, or any part thereof, form any part of the estate and effects of the said bankrupt:

"3. That the said James Sebastian Yeats having become bankrupt and obtained his certificate before the said moneys were received by the defendant, the plaintiffs, as such assignees as aforesaid, have no claim to them, or any part of them:

"4. That the said moneys, having come to the hands of the defendant as the solicitor in the said suit in Chancery, are retainable by him, and may be applied pro tanto in satisfaction of his loan to the bankrupt:

"5. That, at all events, the said sum of 59*l.* 10*s.* 5*d.*, being the amount due to Messrs. Clutton & Fearon for their costs in the chancery suit due to them at the time of the change of solicitors, is properly retained by the defendant for such costs, and the plaintiffs as assignees are not entitled to recover any part of it."

*658] that money at *the time of his bankruptcy? [COCKBURN, C. J.—The defendant undoubtedly might have kept this money if his costs had not been paid in 1846. But, having been paid then under an agreement to refund the money if he should obtain his costs by a decree of the court, the bankrupt might, but for the bankruptcy, have maintained an action against him to recover it back.] The question is whether the assignees have any claim after the bankrupt has obtained his certificate. [COCKBURN, C. J.—Why should not the assignees take the benefit of the contingency?] There being no valid contract founded upon a good consideration, the money cannot be said to have been property or effects of the bankrupt either in possession or in action at the time of his bankruptcy. [WILLIAMS, J.—You agree that this money was not a fruit fallen at the time of the bankruptcy, but only an inchoate right, which might ripen into fruit. Whether there was an agreement or not, cannot, I think, make any difference. The solicitor is bound to repay advances made to him in the progress of the suit. Suppose the plaintiff in an administration suit dies indebted to his solicitor for costs in the suit, and costs are afterwards decreed to him, the solicitor would not in respect of those costs stand in the position of an ordinary creditor,—*Lloyd v. Mason*, 4 Hare 182—otherwise, specialty creditors would be paid before him.] The costs of the suit are so completely in the discretion of the Court of Chancery that the mere hope or expectation of costs would be too shadowy to pass to the assignees. This is more like the case of a money demand barred by the statute of limitations, which, if paid to the bankrupt after certificate, could not be *659] claimed by the assignees.(a) The question of inchoate *right to costs pending suit was discussed in *Smedley v. Philpot*, 3 M. & W. 573.† There A. had commenced a suit in Chancery for an account under a will, in which she employed as her solicitors, first B., then C., who successively gave up the suit, and then D., who continued to conduct it till her death in 1829. After her death, E., her executor, filed a bill of revivor, and D. continued to conduct the suit for him. In 1833, a decree was made, whereby it was ordered that the master should settle the costs of all the parties, and that the same, when taxed and settled, should be paid out of the fund in the following manner, viz. the plaintiff's costs (consisting of the costs of both A. and E.) to D., his solicitor, and the costs of the defendants to their several solicitors. The plaintiff's costs were taxed, and certain sums in respect of them were paid to D. C. sued E., as executor of A., for the amount of his bill, and had judgment of assets *quando acciderint*. He afterwards brought another action on the judgment, and had given notice of trial; and it was then agreed between them, that, on C.'s withdrawing the record, E. would then pay him 100*l.* on account of his bill, and the remainder out of the assets which should first come to his hand as executor of A.; and the record was accordingly withdrawn. A further sum was afterwards paid out of the Court of Chancery to D. in respect of the same costs: and it was held by Parke, B., and Alderson, B. (Lord Abinger,

(a) *Quære*. The statute of limitations bars the remedy only, not the debt: *Higgins v. Scott*, 2 B. & Ad. 413 (E. C. L. R. vol. 22). The statute, at all events, would be no bar to an application by a client to the summary jurisdiction of the court against an attorney for moneys recovered for him in an action or suit brought on his behalf: *Ex parte Sharp*, W. W. & D. 354, 1 Jurist 405.

C. B., dissentiente), that this sum was assets in the hands of E. within the meaning of the agreement. In the course of his judgment, Lord Abinger says: "The fallacy of the *argument on the other side appears to turn upon the supposition that Jane Carter, the [§660 deceased, *had in her lifetime some sort of interest in these costs*, because she was indebted to her attorney in respect of them, and that this interest became vested in the plaintiff as her personal representative. But she had no such interest: she had no inchoate right to costs out of the funds in court: it was purely in the judge's discretion whether the costs incurred by her should be paid out of that fund or not paid at all; or even whether the costs of other parties should not be paid by her, or out of her assets, if she had any. It could not therefore be said, till the Chancellor pronounced his decree, that any person had a right to receive those costs, or an inchoate interest in them. As Jane Carter had no such right or interest, none such could vest in her personal representative." That is precisely the argument which it is proposed to urge here. [COCKBURN, C. J.—It is true, the costs in equity are in the discretion of the court; but that is not an arbitrary discretion; it is to be exercised with due regard to the rights and equities of the parties in the suit.] If the costs had been ordered to be paid by Yeats, the plaintiff in the suit, would the inchoate right to such costs have been a claim which would have been barred by his certificate? [CROWDER, J.—The right to the fruits, or proceeds of the suit, would go to the assignees. (a) Why not the right to the costs?] The statute (12 & 13 Vict. c. 106, s. 153) enables the assignees to continue the suit. [CROWDER, J.—No man can predicate the certain issue of any suit either at law or in equity: but I must confess I cannot see any difference between a contingency as to costs and as to the subject-matter of the suit. WILLES, J.—To succeed in your argument, you must make out that *there was no legal consideration for Taylor's promise to the bankrupt. COCKBURN, C. J.—Independently of the agreement, [§661 the party who obtains the judgment of the court is entitled not only to the principal subject-matter of the suit, but also to the costs, if costs are awarded,—subject, of course, to the lien of the attorney. If he gets rid of the attorney's lien, he is entitled to the whole subject-matter of the suit and also to the costs. So, here, if the assignees had a right to take up the suit and recover the principal subject-matter, the costs as an accessory must follow.] The assignees here took no part in the suit. [CROWDER, J.—It was not necessary: there remained nothing for them to do.] The agreement goes no further than what the law would have implied without it. As to the 59*l.* 10*s.* 5*d.*, it appears upon the face of the case that there was an agreement with respect to Mr. Fearon's costs on the change of solicitors; and under that agreement, the defendant would be responsible to Mr. Fearon for those costs. [WILLES, J.—Taylor received this sum of 59*l.* 10*s.* 5*d.* with notice of Fearon's claim, which is not stated to have been waived. Taylor cannot part with that sum to the plaintiffs, without running the risk of being called upon to pay it over again to Mr. Fearon.] That is precisely what Lord Abinger says in *Smedley v. Philpot*.

Scotland, in reply.—[WILLES, J.—As to the 282*l.* 7*s.* 11*d.*, the court is with you.—But the assignees can have no right to the other sum.]

(a) These, it was stated, had been received by the assignees.

They are the plaintiff's costs, unless the solicitor demands them. From the statement in the case, it must be assumed that Mr. Fearon has given up his claim. [WILLES, J.—The 59*l.* 10*s.* 5*d.* is not within the alleged agreement. As to that, the money has got into Taylor's hands stamped with the right of Mr. Fearon. The assignees can only recover *662] *what the bankrupt was entitled to at law and in equity.] In the absence of a claim by Mr. Fearon, as between these parties the plaintiffs must, it is submitted, be entitled to the whole of the money. The defendant clearly has no right to retain it.

COCKBURN, C. J.—I am of opinion that the plaintiffs are entitled to judgment in respect of the 282*l.* 7*s.* 11*d.* I think they are entitled to recover that sum under the agreement, in which the bankrupt had a beneficial interest which passed to his assignees. It is said that agreement was without consideration: but I do not think that is so; for, though true it is that the defendant, as the solicitor in the suit, was entitled to the costs, still he was not entitled to be paid them by the bankrupt at that time. A solicitor is not entitled absolutely to demand the costs from his client until the end of the suit, though he may refuse to proceed with it unless furnished with funds. The result of the facts stated in the special case, is, that the defendant, the solicitor for the bankrupt in a suit pending in Chancery, having incurred costs to the extent of 282*l.* 7*s.* 11*d.* on his own account, and having undertaken to satisfy Messrs. Clutton & Fearon's claim for costs to the amount of 59*l.* 10*s.* 5*d.* incurred by them before he (the defendant) came into the suit, and being about to raise a loan of 1380*l.* for the bankrupt, stipulates for payment by him of his costs at once without waiting for the termination of the suit. To this the bankrupt accedes, upon the understanding that the defendant was to repay him the amount in the event of his obtaining the costs by a decree in the suit. The defendant, therefore, received his costs before he would in the ordinary course of things have been entitled to them, upon an express promise to refund the amount to his client in the event of their being ultimately *663] *awarded to him by a decree of the court. That clearly was an agreement made upon a good consideration. The defendant, having afterwards obtained a decree for costs, would certainly have been bound to hand over the amount to his client pursuant to that agreement, if he had not become bankrupt: and, if so, it is equally clear, that, upon his bankruptcy, the right to call for the amount passed to his assignees. I also entertain a strong opinion that the assignees, if entitled to the benefit of the judgment in the suit, were likewise entitled to the costs as accessory and incidental to the suit, though it is not necessary to found our judgment upon that. As to the 59*l.* 10*s.* 5*d.*, it is only necessary to say that it does not appear from the case that Mr. Fearon has released his claim to these costs. There is nothing shown which would be a bar to any claim which may at a future time be made by Mr. Fearon or his representatives upon the defendant for this money. In respect of this sum, therefore, our judgment must be for the defendant.

WILLIAMS, J.—I am entirely of the same opinion. It has long been settled that the object of the bankrupt law is, "to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate:" per Lord Tenterden, in *Wright v. Fairfield*, 2

B. & Ad. 727 (E. C. L. R. vol. 22). The question here, as regards the 282*l.* 7*s.* 11*d.*, is, whether the right to have recourse against the defendant upon the agreement stated in the special case was a beneficial matter belonging to the bankrupt's estate. It appears to me that it was so. It was a chose in action vested in the bankrupt at the time of his bankruptcy. He might before his bankruptcy have maintained an action for this money. It is impossible, therefore, to say that it is not a right which passed to his assignees upon his *bankruptcy. I think, upon the facts stated in the special case, the agreement to repay the money was a valid agreement the contingent benefit of which the bankrupt was entitled to immediately after it was made. We do not know very accurately the circumstances under which the payment of the costs was required by the defendant. Having no present right to demand them, it seems that the defendant induced the bankrupt to pay them, upon his promising to repay him the amount in the event of his obtaining a decree for costs in the suit. I think that was a valid contract, the interest in which passed to the plaintiffs as assignees. With respect to the 59*l.* 10*s.* 5*d.* received by the defendant on account of Mr. Fearon's costs, I agree with my Lord that the plaintiffs cannot make any valid claim to that sum. The defendant holds it as trustee for Mr. Fearon or his representatives.

CROWDER, J.—I am of the same opinion. The question is, whether, at the time of the mortgage in 1846, the bankrupt had a right under the agreement upon which the costs were paid to the defendant that would vest in his assignees,—a right which he might have enforced by action. It seems to be quite clear that the 282*l.* 7*s.* 11*d.* was paid to the defendant under an express agreement by which the money was to be handed back to the client in case a judgment should be obtained in the suit by which he would be entitled to costs. If the bankrupt would have had a right to maintain an action upon that contract if the event upon which the money was to be repaid had happened before his bankruptcy, I see no reason why that right should not pass to his assignees. It is said there was no consideration for this contract, inasmuch as the defendant's promise compelled him to do nothing but what the law would imply. The statement in the case, however, does not seem to me to lead to that *conclusion: the solicitor obtained his costs at a time when he was not in a position to enforce his claim to them: and that, I think, was ample consideration for the promise to repay the money in the event of a decree being obtained. There was, therefore, a valid agreement founded upon a good consideration, on which a right of action vested in the bankrupt before the bankruptcy, and which on the bankruptcy passed to his assignees as part of his estate. As to the 59*l.* 10*s.* 5*d.*, however, I think the plaintiffs have no claim to that sum. These were costs due to Mr. Fearon. Upon the change of solicitors, it was agreed between the defendant and Mr. Fearon that the latter should receive the amount at the termination of the suit. For anything that appears, Mr. Fearon may now call upon the defendant for that sum. All that is stated in the case, is, that "Mr. Fearon makes no claim against the defendant in respect of the said costs." There is no pretence for saying that the plaintiffs have any right to the money.

WILLES, J.—I am of the same opinion. The question is, whether

either of the two sums mentioned in the special case constituted part of the personal estate and effects of the bankrupt at the time of his bankruptcy, within the 141st section of the 12 & 13 Vict. c. 106. (a) Mr. *666] *Phear* very properly directed our attention in the *first instance to the consideration whether there was any valid agreement between the bankrupt and the defendant before the bankruptcy, to repay the first of these sums. He perceived that that was the real point in the case, and accordingly he made the best argument that could be made upon it. The case states an agreement between *Yeats* and the defendant, that, if *Yeats* would presently pay him the amount of his costs then incurred in the Chancery suit, he, the defendant, would, in the event of a decree being obtained in *Yeats*'s favour for costs in that suit, repay him the sum so advanced. Upon this state of facts, it seems to me that there was a valid agreement founded upon a sufficient consideration: and the right of the bankrupt under that agreement unquestionably passed upon his bankruptcy to his assignees. This is not unlike the case of the life policy, in *Schondler v. Wace*, 1 Campb. 487, where it was held that a policy of insurance effected by a bankrupt upon his own life at an annual premium, passes to his assignees, however small the apparent value of it may be at the time of his bankruptcy, and although there are considerable arrears of premiums then due upon it; and if, instead of delivering it up as part of his effects, he secretly assigns it to another person, who pays the arrears of the premium, and upon the death of the bankrupt receives the sum insured, such sum, deducting the amount of the arrears so paid, may be recovered by the assignees as money had and received to their use. Lord Ellenborough there says: "This was a possibility of benefit, to which the assignees were entitled as part of the effects of the bankrupt." So, the right to this money under the agreement was a contingent right of the bankrupt, which passed to his assignees as part of his effects. As to the 59*l.* 10*s.* 5*d.*, I also agree with the rest of the court in thinking that the plaintiffs cannot *667] recover *that. The rule, as stated by Willes, C. J., in *Scott v. Surman*, Willes 403, is, that "nothing vests in the assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts." The assignees clearly have no equitable right to this sum. Our judgment, therefore, must be for the plaintiffs as to the 282*l.* 7*s.* 11*d.*, and for the defendant as to the 59*l.* 10*s.* 5*d.* Judgment accordingly.

(a) Which enacts, "that, when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment."

LLOYD v. OGLEBY. Jan. 11.

Where a plaintiff has died since the trial,—*semble*, that a rule for a new trial cannot be moved for without letters of administration being first taken out.

The mere fact of a man's driving on the wrong side of the road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot.

THIS was an action charging the defendant with having so negligently driven a carriage along a public highway as to knock down and severely injure the plaintiff. The cause was tried before Willes, J., at the sittings at Westminster after last Term, when a verdict was found for the defendant. Since the trial the plaintiff had died from the injuries he sustained.

Parry, Serjt., on behalf of the plaintiff's widow, who had not taken out letters of administration, prayed leave to move for a new trial, on the ground that the verdict was against the evidence. He submitted, that, in the event of the court refusing the rule, if the widow were required first to take out administration, that expense would have been needlessly incurred. [COCKBURN, C. J.—The same consideration should induce us to hear the argument on the rule. You had better state the facts.] The facts are shortly these:—On the 23d of *September last, [*668 between seven and eight o'clock in the evening, the defendant was driving with his wife along High Street, Mary-le-bone, at the rate of about seven or eight miles an hour, in a carriage so peculiarly constructed that the driver could only see straight before him. The defendant was on the wrong side, within five or six feet of the kerb, the road being thirty-two feet wide. The plaintiff was crossing the road, when the defendant ran against and knocked him down. It was conceded that there was no other vehicle in the way, to justify the defendant's position: and the defendant (who with his wife had previously to their departure for Australia been examined upon interrogatories) stated that he had deviated from his proper side of the road in order to get out of the way of a crowd opposite a public music hall. [CROWDER, J.—What has the right or wrong side to do with the case of a foot-passenger?] The fact of the defendant's being on the wrong side, it is submitted, is *some* indication of careless driving. [CROWDER, J.—There is no suggestion that the defendant was driving furiously. Whose duty is it to look out?] The vehicle came upon the unfortunate man at a spot where he had no reason to expect a carriage to be.

COCKBURN, C. J.—It was peculiarly a case for the jury. There was evidence on both sides; and the learned judge who tried the cause does not intimate any dissatisfaction with the verdict. It is not, therefore, a case for a new trial.

WILLIAMS, J.—There would have been a difficulty in granting a rule without administration having been taken out, inasmuch as there would have been nobody before the court to represent the plaintiff.

The rest of the court concurring,

Rule refused.

*669] **GARTON and Another v. THE GREAT WESTERN RAILWAY COMPANY.** Jan. 29.

The court confirmed their decision in *Baxendale v. The Great Western Railway Company* (*Reading Case*), ante, p. 336, though it appeared by affidavit that no profit was made either by the company or by the carrier upon the charges for collecting and delivering goods for their customers at the respective stations.

COLLIER, Q. C., in Michaelmas Term last, obtained a rule on behalf of the plaintiffs, carriers, against the Great Western Railway Company, calling upon the company to show cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854, enjoining them to desist from giving any undue or unreasonable preference or advantage to themselves or other persons in the carrying, or in the collecting, carrying, and delivering, for themselves or other persons, of goods and parcels under 500 lbs. weight, or in their charges for the same, over the complainants in the carrying of such goods and parcels for the complainants; and enjoining the said railway company not to subject the complainants to any undue or unreasonable prejudice or disadvantage in the charges made to them for carrying such goods and parcels as aforesaid, with reference to the charges made to other persons for collecting, carrying, and delivering such goods and parcels as aforesaid, with costs.

The motion was founded upon an affidavit which stated in substance as follows:—1. That the Great Western Railway Company are the proprietors of a railway from Paddington, in the county of Middlesex, to Bristol, and are in the habit of carrying goods from London to Bristol, such goods being designated by them as first-class goods, second-class goods, third-class goods, fourth-class goods, and fifth-class goods respectively; and the said company have a distinct rate or charge for each of the said classes of goods, which rate or charge includes cartage from the residence or place of business of the sender in London *670] aforesaid to the *railway station there, together with carriage on the railway from the station at Paddington to the station at Bristol, and also cartage from the last-mentioned station to the residence or place of business of the consignee at Bristol: 2. That the said railway company's rates from London to Bristol, *including the said cartage*, were for some time previous to and in the month of April last, and still are as follows,—for consignments above 500 lbs. in weight, 22s. 6d. per ton for first-class goods, 27s. 6d. per ton for second-class goods, 35s. per ton for third-class goods, 40s. per ton for fourth-class goods, and 45s. per ton for fifth-class goods; and for consignments above 1 cwt. and under 5 cwt. in weight, the like charges of 22s. 6d. per ton for first-class goods, 27s. 6d. per ton for second-class goods, 35s. per ton for third-class goods, 40s. per ton for fourth-class goods, and 45s. per ton for fifth-class goods; and for consignments under 1 cwt. in weight, in all classes alike for and under 56 lbs. 1s. 3d., above 56 lbs. and not exceeding 84 lbs. 1s. 11d., and above 84 lbs. and not exceeding 112 lbs. 2s. 6d.: 3. That, if goods are delivered to the company at the Paddington station, the company are thereby saved the expense of carting to the said station, and, on all consignments above 500 lbs. in weight, they deduct 3s. 4d. per ton from the said respective rates in

respect of such cartage; and, if goods are received by the consignee at the Bristol station, the said company are thereby saved the expense of carting to the residence or place of business of the consignee in Bristol, and on all consignments above 500 lbs. weight, they deduct 1s. 6d. per ton from the said respective rates in respect of such last-mentioned cartage: 4. That, if consignments under 500 lbs. in weight are delivered to the said company at the Paddington station and received by the consignee at the Bristol station, there is the same saving to the company in respect of cartage as is mentioned in the last paragraph *in [671 reference to consignments above 500 lbs. in weight; and, previously to the month of April last, the company deducted the said several sums of 8s. 4d., and 1s. 6d. per ton from their aforesaid respective rates for consignments above 1 cwt. and under 500 lbs. in weight, and the sum of 3d. for each package of goods under 1 cwt. in weight, in respect of the aforesaid cartage: 5. That the complainants had been previously to and since the said month of April last, and still are, in the habit of collecting goods consigned in quantities under 500 lbs. in weight, as well as above that weight, from their customers in London, required to be forwarded to Bristol, and delivering them to the railway company at their station at Paddington, consigned to their firm of Garton & Stone at the Bristol station, where their firm receive the said goods so as aforesaid consigned in quantities under 500 lbs. in weight, and delivered them in Bristol according to the directions of the sender, paying the said railway company their said respective rates mentioned in the second paragraph of the affidavit for the carriage of such goods consigned in quantities under 500 lbs. in weight, from station to station, and, since the 19th of April last, without the aforesaid or any other deduction in respect of cartage: 6. That, on the 12th of April last, the complainants' firm received notice from the said company that they would no longer make any deduction from their aforesaid respective rates; and, since the 19th of April last, they had paid, and still continue to pay to the said company, for goods consigned in quantities under 500 lbs. in weight, the respective rates set forth in the second paragraph of this affidavit for the carriage of such goods from the station at Paddington to the station at Bristol; and the complainants charge their customers, or the consignees of the said goods consigned in quantities under 500 lbs. in weight, the same respective rates which the said railway *company charge the complainants, with [672 a loss to the complainants on consignments above 1 cwt. and under 500 lbs. in weight, of the said sums of 8s. 4d. and 1s. 6d. per ton, and, on consignments under 1 cwt. in weight, of the said sum of 3d. on each package of goods, for the expense of the aforesaid cartage to the Paddington station and from the Bristol station: 7. That the company so refused to make any deduction in respect of cartage on and from the 12th of April last as aforesaid, as the deponent believed, for the purpose of compelling persons desiring to have their goods conveyed by their railway to employ the railway company to collect and deliver such goods, and thus to secure this business, *and the profits upon it*, to the company, and to exclude the complainants from competing with them in that department of business; and that such refusal made and gave an undue and unreasonable preference or advantage to and in favour of the company, and subjected the complainants to an undue and unreason-

able prejudice and disadvantage. [The eighth paragraph referred to a list (marked A.) of goods consigned in quantities under 500 lbs. in weight, with the amounts paid by the complainants to the company for carriage of the same from Paddington station to Bristol station, from the 19th of April to the date of the application.] 9. That the company had from the 19th of April last to the present time charged, and still charge, all persons sending goods from London to Bristol, for goods consigned in quantities under 500 lbs. in weight, in the same several classes and of the same several kinds and descriptions as those mentioned and set forth in the list marked A., the same charges, including cartage from the residence or place of business of the sender in London and cartage from the station at Bristol to the residence or place of business of the consignee in Bristol, as the charges made to and paid by the complainants and set *673] forth in the said list marked A., for the said goods therein specified, for the carriage thereof from station to station only: [The tenth paragraph verified a list of consignments to several persons named, to whom the charges mentioned in the preceding paragraph had been made]: 11. That the complainants had forwarded, and continued to forward, goods of the first, second, third, fourth, and fifth classes, consigned in quantities under 500 lbs. in weight, and for which the company professed to charge, including the cartage from the residence or place of business of the consignor in London to the company's station at Paddington, and from the station at Bristol to the residence or place of business of the consignee in Bristol, the several and respective rates specified in the second paragraph of the affidavit; and that the company charged the complainants the same several and respective rates for the carriage of such goods consigned in quantities under 500 lbs. in weight from the station at Paddington to the station at Bristol, without doing any cartage for them. The affidavit then went on to show the relative quantities of goods consigned by the complainants, and verified a list of the classification of goods made by the company.

Montague Smith, Q. C., and Field, now showed cause, upon an affidavit stating, amongst other things,—that the change of system made by the company in April last was not adopted for the purpose of securing profits upon the business of collection and delivery of small parcels to the company, and to exclude the complainants from competing with them in that department, but was so adopted for the purpose of restoring and securing to the company their fair and legitimate profits as owners of and carriers upon their lines of railway, of which they had been and to *674] a great extent still were deprived by the practices of the *complainants and other carriers,—packing and aggregating small parcels in the manner detailed in the Reading Case, ante, p. 336: That the complainants and other carriers gained so much by this system of packing that they could afford to underbid the company in their rates, and to carry parcels for less than the company's charge would be for the same parcels if carried by them direct: That the complainants and other carriers were in the habit of aggregating parcels without packing them into one bag or hamper, that is to say, they put their own address over that of the ultimate consignee, and they brought up small parcels into a weight entitling them to be carried at a less proportional charge, and which they charged the sender or consignee for at the higher rate of charge, the parcels so aggregated having been collected from different

persons and sent to different consignees: That, in all these cases, the complainants and other carriers collected the parcels as separate parcels, either by the sender taking them to their receiving-offices, or from door to door, by sending round carts for that purpose, and they delivered the parcels packed or aggregated at, and received them from, the stations of the railway, claiming the deductions formerly allowed for collection and delivery: That the complainants and other carriers, as a mode of bringing up the weights of their goods, in giving to the company a list of the goods sent for carriage declared a great number of goods under the general term of "manufactured goods," which was a term used in the company's act of parliament, and the complainants claimed to have all such goods charged in the aggregate as one consignment, though each package might be of a totally different kind or character: That there was formerly allowed to carriers and the public alike, in all cases where goods were delivered to and received from any of the stations of *the railway, and whether they were small parcels or not, 3s. 4d. a ton, or at that rate, in London, and 1s. 6d. per ton at country [*675 stations; that the sums so allowed were not fixed upon with a view to a profit being made upon collection and delivery respectively, but the company were willing to collect and deliver goods for those sums as representing about the actual cost of the services performed, they looking then, as they did now, to making their profit on the railway, and merely performing those services as subsidiary thereto; and that it was believed that the complainants and other carriers did not make any profit out of the allowances so given to them, but that they made their profit out of booking-fees, and by means of their being able to use the railway by packing and aggregating goods, and the other practices above mentioned: That the company were advised that the practices of the carriers as above mentioned were authorized by law, and that the company were bound to receive the parcels from the carriers so packed or aggregated, as if they were persons in trade, and as if the parcels were really sent by them in that way to other persons in trade; and that, in consequence of the continued practice of the complainants and other carriers to pack and aggregate in the manner above mentioned, and their rivalry against the company, and especially in consequence of the complainants declaring their goods under the general term of "manufactured goods," which was of very recent adoption, the company considered that they could afford to forego the whole or a portion of their charge for collecting and delivery of smalls, by offering inducements to the public to send such parcels to them direct, instead of their passing through the hands of carriers, and that the company would in that way gain more, by being able to charge for the carriage on their railway for parcels received from the *public separately, than they did formerly, [*676 when they made a charge for the collecting and delivery: That the company therefore determined, in April last, to make no charge for the collecting and delivery of parcels under 500 lbs. weight, or, in other words, to make the charge from station to station on the railway the same as the charge from or to the company's receiving-houses or the sender's door to and from the consignee's door; but, inasmuch as the system of packing or aggregating was not adopted (as being of no advantage to the carriers) when applied to parcels or packages other than "smalls," the company had not altered their system in respect to those

parcels or packages : That the company had for some time established receiving-houses in several parts of London, and in all large towns and places where their lines of railway touch, at convenient spots for collection of goods, and thereby and by offering inducements to deal with them direct, they obtained, but in a fair way of business, the direct delivery of smalls to them at such receiving-houses, instead of having them packed or aggregated at the stations by the carriers ; that, if there were no such receiving-houses, all the small parcels would be handed to the carriers who have dépôts or receiving-offices, as, though large packages are often sent to the stations by the senders in their own carts or wagons, they seldom, if ever, send small parcels there, and did not do so when the allowance as aforesaid was made ; and that the difference of profit earned by the company upon their lines of railway in respect of small parcels delivered at their receiving-houses, or collected by them from door to door, was enough to render it well worth their while to collect and deliver such parcels to and from the stations, without any charge at all for such collection and delivery ; and that the receiving-offices also tended to *draw to the company goods generally, some *677] of which would be sent by the carriers by other lines of railway than the Great Western Railway, where two or more lines compete : That the complainants and the other carriers were, under the circumstances aforesaid, rival and competing carriers on the railway, and the company were acting in the premises *bonâ fide* with a view to their legitimate and fair profits as carriers on their railway : That the company charged the same rates to everybody as well as to the complainants and other carriers, and they had at all times been and were ready and willing to collect and deliver for them on the same terms and in the same way as they did for the public generally : And that it was the general practice of nearly all the railway companies who collected and delivered goods, including those who employed Messrs. Pickford & Co. as agents for the purpose, to refuse to make an allowance for collection and delivery on parcels below a certain weight, or, in other words, they collected, carried, and delivered goods for the same charge as they made for the carriage from station to station, and bore the cost themselves of the collection and delivery.

[COCKBURN, C. J.—Is there any distinction between this case and *Baxendale v. The Great Western Railway Company* (the Reading Case), *anté*, p. 336 ?] There is a distinct statement here that no profit is made by the company upon the collection and delivery of small parcels ; but that this service is gratuitously performed by them as ancillary to the carriage from station to station. [COCKBURN, C. J.—That was carefully concealed from us in the Reading Case.] The affidavits on the part of the complainants there did not assert that profit was made upon the collection and delivery : it was unnecessary, therefore, to negative it. [COCKBURN, C. J.—It was part of the Attorney-General's argument *678] that it *was competent to the company to make profit either on or off their line.] It is somewhat hard upon the company to hold them to be bound by an admission made by counsel. [COCKBURN, C. J.—The court founds its judgment upon the facts which are sworn to and *assumed*. It is hard upon the court to be told afterwards that the admission was improvidently made. Our decision, however, was not based merely upon the undue preference. Independently of that,—

assuming that the company derived no benefit from the collection and delivery, still the complainants incurred a disadvantage or undue prejudice from being charged the same for the carriage of their goods as if they availed themselves of a service which they did not require at the hands of the company.] The charge is made to all alike. [COCKBURN, C. J.—The effect is this, that, in order to compete with the carrier, the company make a man who has his own wagons and horses, and therefore does not require them to collect and deliver for him, pay more than he ought to pay for the transit on the railway. It is clearly a case of undue prejudice against the person not wanting the accommodation. If the company feel aggrieved, they must go to the legislature. I must confess I have always felt that the packed-parcel system operates hardly upon the railway. If it were a mere question between the company and the carrier, I should have thought the case required great consideration. But still the other question remains: there is a large class of the public who are as much prejudiced as the carrier.] Our affidavits show that small parcels are seldom sent to the station by the general public; but that these usually come from the receiving-houses. It is substantially a question between the railway company and the carrier. To bring the case within the statute, it must be shown that the preference or the prejudice is *undue*. That *cannot be fairly said to be undue [*679 which is the result of bonâ fide competition. The public do not complain of any prejudice here: it is only the carriers who complain. [COCKBURN, C. J.—The company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services which they do not desire to avail themselves of. That is not a legitimate mode of getting rid of the contest with the carriers.] *Parker v. The Great Western Railway Company*, 6 Ellis & B. 77 (E. C. L. R. vol. 88), was referred to.

PER CURIAM.—We must adhere to our former decision; and therefore the rule must be made absolute, with costs.

Rule absolute, with costs.

PELLEY v. SIDNEY. Jan. 31.

A. having an estate for sale which he conceived might be more advantageously disposed of in connection with a patent-right possessed by B., a negotiation took place between them which resulted in the following proposal from B.:—"I give A. full liberty to make use of my patent-right for the jug, in his advertisement for the sale of the Arley works, upon the recognised condition, that, if the works are sold, I am to receive 1000*l.*," &c. This proposal was assented to by A., and the patent was tendered to him, but he required an assignment, and B. not being willing to make an assignment, the negotiation went off. The estate without the patent-right was afterwards conveyed to a company which A. was instrumental in forming, and in which he became a shareholder:—Held, that the event upon the happening of which B. was to be entitled to the 1000*l.* had never happened.

B. requiring an advance of 50*l.* to pay the stamp-duty on the patent, and one S. being willing to lend him that sum if A. would become surety for it, A. wrote as follows:—"If B. will get his friend S. to advance the 50*l.* for the completion of the patent, I will give him or S. the 50*l.* on the patent being handed over to me." The 50*l.* was accordingly advanced by S. and the patent was afterwards tendered to A., but he declined to accept it; and S. having sued him for and recovered the 50*l.*, he brought an action against B., for money paid to his use:—Held, that A. was entitled to recover the 50*l.*; and that the refusal of the judge to put it to the jury whether the money was advanced by S. for the joint purpose of A. and B., did not amount to misdirection.

THIS was an action for money lent and money paid for the defendant at his request.

*680] The defendant pleaded never indebted, and a set-off *amongst other things for money payable by the plaintiff to the defendant in respect of the defendant's having at the plaintiff's request given liberty to the plaintiff to make use of and advertise a certain patent-right of the defendant for a jug, in divers advertisements, &c., and for and in respect of a sum of 1000*l.* by the plaintiff, by an agreement between him and the defendant for a good and sufficient consideration in that behalf agreed to be paid to the defendant, on the sale of certain pottery works of the plaintiff called the Arley works, for an exclusive license to be given and granted by the defendant to the plaintiff, or to him and such parties or persons as he might direct, for the user by him or them to work and use in earthenware a certain patent-right belonging to the defendant, there having been a sale of the said works, and the defendant having been always ready and willing to give and grant the said license, and he having in other respects done and performed all things, and all things having happened, to entitle him to payment of the said 1000*l.*

The cause was tried before Byles, J., at the second sitting in London in this term. The plaintiff sought to recover 80*l.*, of which 30*l.* was claimed as money lent to the defendant, and 50*l.* as money paid to his use under the following circumstances:—

In the year 1856, the defendant possessed a patent for the manufacture of a peculiar description of jug. The plaintiff, being then about to dispose of an estate called "The Arley Estate," the soil of which was adapted for pottery-works, and conceiving that it might be more advantageously disposed of in connection with a right to use the defendant's patent, entered into an arrangement for that purpose, which was contained in the following correspondence through one Collinson, a mutual friend of the parties:—

*681] "8, Copthall Court, May 7th, 1856.
"My dear Collinson,—In reference to our conversation, I give Captain Pelly full liberty to make use of my patent-right for the jug, in his advertisement for the sale of the Arley works, upon this recognised condition, that, if the works are sold, I am to receive 1000*l.*, and such further royalty for an exclusive license to work my patent in earthenware, as we may in a friendly and fair spirit of business, or by reference, agree upon.
"GEORGE SANDS SIDNEY."

To this letter the plaintiff replied as follows:—

"4, Fenchurch Street, May 8th, 1856.
"My dear Collinson,—Mr. Sidney's letter to you is quite satisfactory between two gentlemen, and I am sure you will think so.
"R. W. PELLEY."

The plaintiff advertised the estate for sale; the advertisement stating that the proprietor had the exclusive right of manufacture of a very valuable pottery patent.

It being necessary to pay a sum of 50*l.* to secure the validity of the patent, the defendant applied to one Sim to advance him 50*l.* for that purpose, and proposed to the plaintiff to become surety to him for its repayment. The plaintiff thereupon addressed a letter to Mr. Collinson, as follows:—

"4, Fenchurch Street, June 13th, 1856.

"My dear Collinson,—I have been thinking over Mr. Sidney's patent; and, if he will get his friend Mr. Sim to advance the 50*l.* for the completion of it, I will give him or Mr. Sim the 50*l.* on the patent being handed over to me, as I prefer this to being surety to another party.

"R. W. PELLY."

*This letter was handed by Mr. Collinson to the defendant, who took it to Mr. Sim, who thereupon advanced the money for [682 the duty. The patent was subsequently tendered to the plaintiff, but he required an assignment; and, this not being made, he refused to repay Sim the 50*l.* An action was afterwards brought against the plaintiff by Sim, who obtained a verdict against him.

It was contended on the part of the defendant, that the plaintiff was equally interested with the defendant in getting the patent stamped, and that the 50*l.* advanced by Sim for that purpose was as much lent to the former as to the latter, and consequently, that, in paying Sim, the plaintiff was paying his own debt, and not paying money to the defendant's use.

It was further contended for the defendant, that he was entitled to set off the 1000*l.*, which, it was alleged, had become due from the plaintiff to the defendant by reason of the sale of the Arley works.

As to this, the evidence was, that the plaintiff sold the Arley estate in February, 1857. The evidence as to this was, that a company was formed to work the estate in which the plaintiff took shares himself and induced other persons to take shares; but this was without any reference to the defendant's patent-right, which he had some time previously declined to have anything further to do with.

The learned judge intimated an opinion that the plaintiff had only a contingent interest in the patent-right when the 50*l.* was advanced by Sim for the purpose of stamping the patent, and that the money was lent to the defendant only; and that, in point of law, there had been no such sale of the Arley works in conjunction with the patent-right as to entitle the defendant to claim the 1000*l.* under the agreement: but he left it to the jury to say whether or not there had *been such [688 sale in point of fact; and, at the request of defendant's counsel, he also asked the jury whether the 50*l.* advanced by Sim had been advanced for the joint purposes of the plaintiff and the defendant.

The jury said they had a difficulty in answering this last question, and the learned judge, telling them that it was in his judgment immaterial, withdrew it: as to the other question, the jury found there had been no sale of the estate with the patent-right, and they accordingly found a verdict for the plaintiff, damages 80*l.*

Shee, Serjt., on a former day in this term, moved for a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence. He submitted that the plaintiff and the defendant had a common interest in the patent, and that the evidence showed that Sim made the advance as much for the one as the other, and therefore the question was a material one, and ought not to have been withdrawn from the jury. [CROWDER, J.—The money could only have been useful to the plaintiff provided he got a legal right to the patent.] The exclusive use of the patent-right was important to recommend his estate.

Then, as to the set-off. The proof of the sale of the Arley works was this,—that the plaintiff procured a company to be formed, took shares in it himself, and got other persons to take shares. The learned judge said that this was no sale, and that alone disentitled the defendant to rely upon the set-off. It is submitted, however, that that was a sale within the meaning of this agreement: the plaintiff by this transaction ceased to be the master of the estate, and the company became the owners of it.

COCKBURN, C. J.—We will speak to my Brother Byles.

Cur. adv. vult.

*684] *WILLIAMS, J., delivered the judgment of the court:—The first objection made to the summing up in this case was, that the learned judge should have required the jury to answer a question which was put to them at the instance of the defendant's counsel, and which he insisted was a material question, but which the jury declined to answer, viz. whether the 50*l.* advanced by Sim was advanced for the joint use of the plaintiff and the defendant. We think that point was wholly immaterial, and that the view taken by the learned judge was correct. In the result, it was perfectly clear that the money was advanced to the use of the defendant. The second objection urged upon the motion, was, that my Brother Byles told the jury, that, in his opinion, there had been no such sale of the Arley works as was contemplated by the agreement, so as to entitle the defendant to the 1000*l.*, and that the learned judge was wrong in coming to that conclusion. We are of opinion that the 1000*l.* was to become payable only in the event of the Arley works being sold with the patent-right annexed to them: and, as it is clear upon the evidence that the works were not sold with the patent-right so annexed, there is no pretence for saying that the event had happened upon which alone the defendant was to become entitled to the 1000*l.* in respect of which the set-off is claimed. There will therefore be no rule.

Rule refused.

*685] *THOMPSON and Others v. PARISH. Jan. 28.

Taking the defendant in execution is not an absolute extinguishment of the debt, so as to preclude the plaintiff from applying to the equitable discretion of the court to set off interlocutory costs due to the defendant in the same suit; though (*semble*) costs due to the defendant in a separate and distinct action cannot be so set off.

The plaintiffs obtained judgment against the defendant, and took him in execution. The defendant applied to a judge to discharge him from custody on the ground of irregularities in the plaintiffs' proceedings; and the plaintiffs obtained a cross-summons for leave to amend. The two summonses were heard together, and the judge made an order "that the plaintiffs be at liberty to amend, and that they should pay to the defendant his costs of and occasioned by the application to amend, and also by the defendant's application to set aside the proceedings." The court, in the exercise of its equitable jurisdiction, ordered that the costs payable to the defendant under the judge's order (which they held to be "interlocutory costs" within the 63d rule of Hilary, 1853) should be set off against the plaintiffs' judgment,—dissenting from the law as laid down by Littledale, J., in *Beard v. McCarthy*, 9 Dowl. P. C. 136, and holding *Peacock v. Jeffery*, 1 Taunt. 426, and *Simpson v. Hanley*, 1 M. & Selw. 696, to have been overruled by *Taylor v. Waters*, 5 M. & Selw. 103.

In the year 1857, the plaintiffs, as executors of Alfred Batson, deceased, commenced an action against the defendant to recover arrears

of rent due from the defendant to their testator at the time of his decease; and they at the same time commenced another action against him as devisees in trust of the said Alfred Batson for other arrears of rent which became due to them as such devisees in trust since the death of the testator. The two actions were referred under the 17 & 18 Vict. c. 125, s. 3, to an arbitrator, who, on the 27th of August, 1857, certified in favour of the plaintiffs in each action,—in the first for 110*l.* 11*s.* 10*d.*, and in the second for 50*l.* 5*s.*; and he directed that the defendant should in each action pay to the plaintiffs the cost of the reference, and that the defendant should bear and pay the costs of the award, and that, if the plaintiffs should pay the costs of the award, the defendant should repay them the sum they should so pay. The defendant applied by summons to have the award or certificate referred back to the arbitrator; but the summons was dismissed with costs.

The costs of the first action were taxed at 8*l.* 16*s.* 2*d.*, and the costs of the second action at 74*l.* 3*s.* 9*d.*, and judgment was signed in each action on the 11th of November, 1857. On the 14th of December, a ca. sa. issued upon the judgment in the first action, and the defendant was arrested thereon. A ca. sa. also issued *against him in the second action, and notice thereof was given to the sheriffs. On [*686 the 7th of April, 1858, a summons was taken out, at the instance of the defendant, in each action, calling upon the plaintiffs to show cause why the ca. sa. should not be set aside, and the defendant should not be discharged from the custody of the sheriffs of London, on the ground “that no judgment at the suit of the plaintiffs was entered up against him on the 11th of August, 1857, that the sheriffs of London had been directed in the writ to levy more than the plaintiffs were entitled to claim, viz. interest from that day, and that the writ was not tested in the name of the Chief Justice of the Court of Common Pleas,” and why the plaintiffs should not pay the costs of the application. On the following day, the plaintiffs’ attorneys took out a summons to amend in each action. The four summonses were heard together before Pollock, C. B., on the 9th of April, when an order was made that the plaintiffs should be at liberty to amend the judgments and writs, and that they should pay to the defendant his costs of and occasioned by the applications to amend and also by the defendant’s application to set aside the proceedings. These costs, as taxed, amounted in the aggregate to 24*l.* 16*s.* 6*d.*

On the 27th of November last, a summons was taken out on behalf of the plaintiffs in each action, calling upon the defendant to show cause “why the plaintiffs should not be at liberty to set off or deduct from the judgment in the first-mentioned action, or in equal or other portions from the judgment in each, the sum of 24*l.* 16*s.* 6*d.*, the taxed costs under the order of the 9th of April, and why those costs should not thereby be deemed satisfied, and why all further proceedings on the said order should not be stayed.” These summonses came on to be heard before Byles, J., on the 30th of November, when his Lordship declined to *make any order, but stayed the proceedings until the fourth [*687 day of the present term, to enable the plaintiffs to make an application to the court.

No payment had been made by the defendant to or towards satisfaction or discharge of the judgments or either of them, but the whole of

the above sums remained unpaid, together with an arrear of interest which had accrued due on the judgments respectively; nor had the defendant paid the costs of the order dismissing his application to refer the award back to the arbitrator.^(a)

Hawkins, Q. C., accordingly, on the fourth day of this term, obtained a rule nisi in the terms of the summons of the 27th of November. He referred to *Beard v. M'Carthy*, 9 Dowl. P. C. 136, *Peacock v. Jeffery*, 1 Taunt. 426, *Simpson v. Hanley*, 1 M. & Selw. 696, and *O'Hare v. Reeves*, 13 Q. B. 659 (E. C. L. R. vol. 66). [*WILLES*, J., referred to *Taylor v. Waters*, 5 M. & Selw. 103.]

Couch now showed cause.—There are two objections to this rule. The first is, that the plaintiffs, by taking the defendant in execution under the ca. sa., have precluded themselves from any other remedy; the judgment is satisfied: per Parke, B., in *Morgan v. Cubitt*, 3 Exch. 612, 615.† In *Beard v. M'Carthy*, 9 Dowl. 136, it was held, that, where a defendant is taken in execution for the debt and costs recovered in an action, he is entitled to interlocutory costs in that action, which have not been set off on taxation. In that case, the plaintiff had commenced an action by writ of summons, and by a judge's order the service was set aside for irregularity, with costs. A fresh service of the writ *688] was effected, and the plaintiff proceeded with the action, obtained judgment therein, and took the defendant in execution. The defendant then sought to enforce payment of the costs due to him under the judge's order: the plaintiff applied to set off those costs against the debt and costs recovered by the judgment: and, after time taken to consider, Littledale, J., said,—“It seems to me that taking the defendant in execution is the same as if the defendant had paid the debt and costs: and, consequently, that the defendant is not bound to allow his costs to be set off against the debt and costs recovered by the judgment.” That is an express authority to show that the plaintiffs cannot set off these costs: and it is put by the court upon the ground that the taking the defendant in execution is tantamount to payment of debt and costs. In *Taylor v. Waters*, 5 M. & Selw. 103, where it was held that B. cannot, in an action brought against him by A., set off a judgment recovered by him against A., for which A. is charged in execution, Lord Ellenborough says: “The taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor; and in like manner precludes a set-off against him.” And Bayley, J., says: “The taking him in execution destroys all remedy against him during his life.” These two cases of *Taylor v. Waters*, and *Beard v. M'Carthy*, are treated as leading authorities upon this subject in Archbold's Practice, 9th edit., by Prentice, 650, and Gray on Costs 517. In *Beavan v. Robins*, 8 D. & R. 42 (E. C. L. R. vol. 16), the plaintiff, being nonsuited, was taken in execution by the defendant for the costs, and, whilst in execution, brought another action for the same cause, and the court refused to stay further proceedings in the second action until the costs of the first were paid. And Abbott, C. J., said,—“I think *689] the objection to this rule is unanswerable. Here the plaintiff is actually in execution for the costs of the former action: you can have no more than his body.” The case of *Melville v. Leeson*, 27

(a) It appeared from the affidavit in answer that these costs were included in the judgment under which the defendant was detained.

Law J., Q. B. 318, which was referred to before the learned judge, to show that the costs in question were interlocutory costs, and therefore the subject of a set-off under the 63d rule of Hilary, 1853, is clearly distinguishable, inasmuch as there the defendant had been discharged from execution, and therefore it was the same as if he had never been taken in execution at all. The next objection is, that, the payment of the costs of the application at Chambers, though not strictly made a condition of the plaintiffs' being allowed to amend their proceedings, was in effect a condition. It was, to use the language of Tindal, C. J., in *Doe d. Hope v. Carter*, 1 M. & Scott 516 (E. C. L. R. vol. 28), 8 Bingh. 330 (E. C. L. R. vol. 21), "a bargain between the parties by which the plaintiffs have obtained an advantage." To allow this set-off, would be to relieve the plaintiffs from performing the bargain on which the amendment was allowed.

Hawkins, Q. C., in support of the rule.—The main question is whether these interlocutory costs,—which according to *Melville v. Leeson*, 27 Law J., Q. B. 318, they clearly are,—can be set off against the judgment for which the defendant is in execution *in the same action*. No laches can be imputed to the plaintiffs; for, as soon as the costs were taxed, they applied to a judge at Chambers to do that which is now sought by this motion. In *Beard v. M'Carthy*, 9 Dowl. 136, the costs payable to the defendant under the judge's order had been taxed and were payable before the judgment was signed in the action, and the plaintiff had omitted to set them off at the proper time. Besides, that case can hardly be considered to be law. *Taylor v. Waters*, 3 M. & Selw. 103, only goes to this extent, that the *taking the body in execution bars the remedy against the debtor. The plaintiffs [*690 here are not seeking to enforce the judgment, but merely to protect themselves from a demand for costs in the same action, whilst a larger sum is due to them upon the judgment. In *Peacock v. Jeffery*, 1 Taunt. 426, it was distinctly held that taking the person in execution does not satisfy the debt so as to extinguish it; but it may still become the subject of a set-off. And that was acted upon in *Simpson v. Hanley*, 1 M. & Selw. 696. [WILLIAMS, J.—Neither of those cases was referred to in *Beard v. M'Carthy*. *Peacock v. Jeffery* is clearly not law: the set-off there was of an independent cause of action.] *O'Hare v. Reeves*, 13 Q. B. 659 (E. C. L. R. vol. 66), is also an authority in favour of the position that the taking the defendant in execution does not extinguish the debt. [CROWDER, J.—None of the cases were cited there. *COCKBURN*, C. J.—The ground of the decision was, that the plaintiff frustrated the execution by taking the benefit of the 48 G. 3, c. 128, s. 1. He does that subject to the condition that the debt shall be kept alive against his goods. WILLIAMS, J.—It seems hard that a person who has a claim for interlocutory costs should be in a worse position than one who has a judgment. Although *Peacock v. Jeffery* seems to show that an independent judgment may be set off, although the party has been taken in execution upon it, yet there are two clear authorities that there can be no plea of set-off where the plaintiff has been taken in execution upon the judgment sought to be set off. That was expressly decided in *Taylor v. Waters*, 5 M. & Selw. 103. WILLES, J.—If it cannot be set off by plea, what authority is there for saying that it may be set off on motion?] The authorities are, no doubt, most con-

flicting: but it must be borne in mind that set-off is a strict legal right, and a plea of set-off is only allowed where the demands are mutual; *691] *whereas, this is an application to the equitable jurisdiction of the court, who will not allow its process to be abused for purposes of injustice. [COCKBURN, C. J.—If the defendant had been discharged from the execution on the ground of irregularity, the plaintiffs would have issued an execution afresh, having first deducted these costs. You say that they are substantially in the same position as if that course had been pursued?] Precisely so. I ask the court to give the plaintiffs the benefit of its equitable jurisdiction over the proceedings in this action.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. The case of *Melville v. Leeson* establishes that these costs are interlocutory costs in the cause; and there is no doubt that the court, in the exercise of its equitable jurisdiction, may allow interlocutory costs accruing antecedently to the judgment to be set off against the judgment. The only difficulty here is that these costs were incurred subsequently to the judgment. I agree with my Brother Williams that the case of *Peacock v. Jeffery*, 1 Taunt. 426,—where it was held that a defendant might set off against a debt due to him from the plaintiff a judgment upon which he had taken the plaintiff in execution,—cannot be maintained as law. But there is an obvious distinction between that case and the present, inasmuch as here the costs sought to be set off are costs in the cause, though posterior to the judgment.(a) *692] In such a case it *seems to me that the court has a discretionary power to allow the set-off, and is bound to see that its process is not abused. I think it would be a gross abuse of the process of the court, if an execution-creditor, having taken his debtor and having him in execution for a large sum, were to be compelled to hand over to his debtor (his claim being unsatisfied), a smaller sum which has become due to the latter for interlocutory costs in the same action. No doubt, there is a case which directly militates against the course we propose to take, viz., *Beard v. M'Carthy*, 9 Dowl. P. C. 136. Although I entertain the most profound respect for the learned judge who decided that case, I cannot help thinking that he went further than can be supported by any authority or any principle, when he said that “taking the defendant in execution is the same as if the defendant had paid the debt and costs.” I agree that it discharges the debtor so far as to prevent his creditor from pursuing any further remedy against him: but it is too much to say that it is equivalent to payment of debt and costs. The effect of taking the debtor in execution, is, to suspend all other remedies against him for the debt. The creditor could not set it off against an independent claim for damages or costs in another action: but, where the debtor is in execution, and the creditor's claim unsatisfied, if a conflicting claim for costs arises in the particular cause, it seems to me that it is within the equitable jurisdiction of the court to see that in working out its process injustice is not done. It cannot be said that the debt is so far extinguished by the defendant's being taken

(a) Not strictly and technically “costs in the cause,” but costs incurred in the action. “Costs in the cause,” properly so called, are those costs only which the successful party in the suit would be entitled to on taxation, in the absence of an order to the contrary in the particular proceeding; and this necessarily excludes costs incurred subsequently to final judgment.

in execution, as to preclude the court in its discretion from allowing the set-off here prayed. Look at the circumstances. The defendant says, that, by reason of certain irregularities in the plaintiffs' proceedings, he is entitled to be discharged from custody. The *plaintiff applies [*693 to a judge to be allowed to amend; and an order is accordingly made that the plaintiff amend his proceedings on payment of the costs occasioned by the alleged irregularities. The whole practically amounts to this,—that the defendant has been discharged from the first process, and taken in execution again under the amended process. If that had in reality been done, these costs might have been set off at once, and then the defendant would have been charged in execution for the debt and costs minus the amount now in question. Practically, no injustice has resulted from the course pursued, for the defendant has never sought to be released upon payment of the debt and costs less the costs payable under the order of the 9th of April. And the plaintiffs have been guilty of no laches, but made this application as soon as the costs were taxed. I therefore think we are bound to exercise our equitable jurisdiction in favour of the plaintiffs, and to allow the set-off.

WILLIAMS, J.—I am of the same opinion, though I have felt no little doubt during the argument; and I must confess that my doubts are not entirely removed, though they are not important enough to induce me to differ from my learned Brothers. The first topic urged by Mr. *Couch* against the rule, was, that the Lord Chief Baron never could have intended that these costs should be made the subject of a set-off; but that the order to amend was really meant to be conditional on payment of the costs of and occasioned by the irregularities. But, upon consideration, it seems to me that that is mere matter of surmise; and that, if the matter had been brought to the attention of the Lord Chief Baron at the time, he would have directed the costs of the amendment and of the summonses to discharge the defendant to be deducted from the amount *for which the defendant was to be detained in execution. All that, however, is mere conjecture: we can only act [*694 upon the order as we find it. Then, according to *Melville v. Leeson*, if there had been no execution in this case, the costs in question would have been interlocutory costs, and might have been set off against the judgment-debt due to the plaintiffs: and the question simply is, whether the set-off is precluded by reason of the debtor having been taken in execution. The authorities upon the subject are apparently conflicting: but, when looked at narrowly, none will be found important except *Beard v. McCarthy*, 9 Dowl. 136. I think *Taylor v. Waters*, 5 M. & Selw. 104, has established, on a satisfactory ground, not that the taking the debtor in execution extinguishes the debt, but that it bars the remedy, and so precludes the right of set-off in respect of a separate and distinct matter. If that be the true view of the law, it follows that the cases of *Peacock v. Jaffery*, 1 Taunt. 426, and *Simpson v. Hanley*, 1 M. & Selw. 696, which was founded upon it, are not good law. They are inconsistent with, and are in effect overruled by, *Taylor v. Waters*. I take it, then, to be clear that a judgment-debt, for which the debtor has been taken in execution, cannot be directly or indirectly made the subject of a set-off by the judgment-creditor against a claim arising out of a separate and distinct matter. In the case now under consideration, the costs which are sought to be set off arise in the same cause: and the

question is, whether interlocutory costs (which these must be taken to be), can be set off after the defendant has been taken in execution. Independently of authority, I certainly feel some difficulty in saying that this set-off can be allowed, because it may be said that here the creditor, during all the time which elapsed between the original taking *695] of the defendant in execution and the time at *which it was sought to set off these costs, has had the body in execution for the entire debt. It does not, however, appear that the defendant has been at all prejudiced by that here. If it had appeared that the defendant could or would at any time during that interval have paid the difference between the judgment and these costs, I think the case would have stood in a very different light. The question, however, must after all turn upon the discretion of the court over its own process. The difficulty I feel in saying that these costs can be set off, is, that it seems to be an infringement of the rule laid down in several cases,—by Bayley, J., for instance, in *Taylor v. Waters*. Then, again, I cannot without hesitation give an opinion contrary to the considered opinion of that very eminent judge, Mr. Justice Littledale, who was peculiarly conversant with this subject; though I feel the less difficulty in disagreeing with him, because in his judgment in that case I think he puts it too high: the taking the defendant in execution does not amount to payment. In fact our decision in this case is little short of overruling the case of *Beard v. McCarthy*. Upon the whole, I agree with the rest of the court in thinking that the proper ground of our decision is, that we will not lend our aid to the defendant to take these costs out of the pocket of the plaintiffs, who have so large an unsatisfied claim against the defendant. I think the rule should be made absolute. As to the argument of hardship upon the attorney to allow these costs to be set off, I cannot help adverting to the distinction between interlocutory costs and the judgment-debt. For some reason or other, it has been thought right to provide, that, although no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, yet *696] interlocutory costs in *the same suit may be deducted from the general costs, even though the attorney's lien may be prejudiced thereby.

CROWDER, J.—I also am of opinion that this rule must be made absolute. The order of the 9th of April does not make the payment of the costs a condition of the amendment being allowed: it is simply an order that the amendment shall be made, and that the costs shall be paid: and, according to *Melville v. Leeson*, these are interlocutory costs, which clearly upon the authorities might have been set off against the judgment if the defendant had not been taken in execution. The only question is whether, the defendant having been taken in execution, he is to receive the costs under the order, whilst he has not otherwise satisfied the debt and costs in the action than by remaining in prison. *Taylor v. Waters*, 5 M. & Selw. 103, is an authority only for this, that there can be no set-off, where the subject-matter of the claim sought to be set off arises in a distinct action. But that does not apply where, as here, the subject-matter of set-off arises in the same action. It seems to me that it would be the grossest injustice to allow the defendant to receive costs from the plaintiffs under such circumstances; and I think

we have ample power to interfere to prevent it. I agree that this is an application to the equitable discretion of the court: and, if it could have been shown that the defendant had sustained prejudice by being kept in custody for the larger sum, when he was prepared to pay the smaller, there might be some reason for our declining to accede to this application. But nothing of the sort is suggested here. It seems to me that we have the power, in order to prevent an abuse of our process, to say that the set-off claimed may be allowed. With respect to *the case of *Beard v. M'Carthy*, 9 Dowl. P. C. 136, I entirely agree [*697 with the observations of my Brother Williams. I should be very slow to overturn a case in which the very learned judge who decided that case had given a deliberate judgment: but, looking at the reasons he there gave, I must say that I think he lays down a proposition which cannot be supported, when he says that "taking the defendant in execution is the same as if he had paid the debt and costs." That is directly opposed to what was said by Lord Ellenborough in *Taylor v. Waters*, 5 M. & Selw. 103, that "the taking of the body in execution does not extinguish the debt, but it bars the remedy against the debtor." That seems to me to be the more correct statement of the law. The remedy is suspended so as to preclude a set-off of costs accruing in an independent action, but not so as to preclude a set-off of costs accruing in the same action.

WILLES, J.—I am of the same opinion. The plaintiffs had no opportunity of setting off these costs before the present application. It appears that they are interlocutory costs incurred in the same suit as that in which the judgment against which it is sought to set them off has been recovered, and not costs incurred in another action. We are here dealing with proceedings in the particular suit: and it is our duty as well as we can to see that complete justice is done between the parties. That requires that the creditor should be satisfied the amount of his judgment for debt and costs: and it would certainly be great injustice if the defendant, when he is obliged to go to gaol because he is unable or unwilling to pay his creditor, should still have power to compel the latter to pay him a sum of money in respect of costs incurred in the course of the same proceedings. It would need some very strong [*698 *authority to induce us to come to such a conclusion. Mr. *Couch* says that the taking the debtor in execution under a ca. sa. is an extinguishment and satisfaction of the debt. That, however, clearly is not so. In *Foster v. Jackson*, Hob. 52, 59, where the origin of the execution by ca. sa. is given in the course of a very learned and elaborate judgment, it is expressly laid down that the taking the debtor under a ca. sa. is not an actual satisfaction. If a person taken on a ca. sa. died in execution, the plaintiff had no further remedy, because he had determined his choice by this kind of execution, which, affecting a man's liberty, was esteemed the highest and most rigid in the law. So, if a party taken on a ca. sa. escaped, or was rescued, the plaintiff could not sue out a new execution. But that was set right by the statute 21 Jac. 1, c. 21. It comes, then, to this, that the creditor, having elected to take his remedy against the body of his debtor by ca. sa., cannot afterwards have recourse to any other remedy against his lands or goods. Here, the plaintiffs have their debtor in execution upon a judgment obtained against him; and an order has been made in the same suit,

under which the defendant has become entitled to a small sum for costs. The parties are still before us. We think it would be manifestly unjust to allow the defendant to obtain money from the plaintiffs under that order whilst their larger claim against him remains unliquidated. I quite feel, that, in so deciding, we are differing from the decision come to by Littledale, J., after deliberation, in the case of *Beard v. M'Carthy*, 9 Dowl. P. C. 136, and that our judgment cannot be carried to a court of error. But, notwithstanding these circumstances, the parties are entitled to have our opinion. And the best opinion that I can form is, that the set-off claimed ought to be allowed. In saying that taking the

*699] debtor in execution under a ca. sa. is not a satisfaction of the *debt, I do not mean to say that in no case can it so operate: for instance, in a case where the debtor has been discharged by consent, (a) a different question might arise; for, there, the creditor would have had complete satisfaction, and the debt would be extinguished. I did not advert to that, because the question could hardly arise in the same suit.

Rule absolute.

(a) See *Cattlin v. Kernot*, 3 C. B. N. S. 799 (E. C. L. R. vol. 91).

ANTONIO ROSSI v. GRANT. Jan. 19.

The plaintiff having brought an action for wages as a seaman to an amount less than 50*l.*, together with a claim for damages for an alleged assault,—the court allowed the defendant (upon terms) to plead, in addition to others, a plea founded upon the 188th and 189th sections of the Merchant Shipping Act, 17 & 18 Vict. c. 104.

THE declaration in this case contained three counts for three several alleged assaults, a count for not supplying the plaintiff, a mariner, with proper food whilst on board the defendant's ship, and for non-payment of wages, and also a count upon an account stated.

W. Williams moved for leave to add a plea, which had been disallowed by Byles, J., at Chambers, that the action was brought for the recovery of wages under 50*l.*, and the plaintiff was therefore precluded by the 188th and 189th sections of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, from maintaining an action in the superior court. The 188th section enacts that "any seaman or apprentice, or any person duly authorized on his behalf, may sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made

*700] is or resides,—or, in Scotland, either before any such justice, or before the sheriff of the county within which any such place is situated,—for any amount of wages due to such seaman or apprentice not exceeding 50*l.* over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final." And the 189th enacts that "*no suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted by or on behalf of any seaman or apprentice in any court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any superior court of record*

11 Her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any justice acting under the authority of this act refer the case to be adjudged by such court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore." [COCKBURN, C. J.—I think this is a question which the defendant ought to have an opportunity of raising.]

Brett showed cause in the first instance.—The question is, whether the plaintiff is to have part of his cause of action tried before the magistrate, and the other part here. [COCKBURN, C. J.—If the statute has clearly and absolutely deprived the superior court of jurisdiction, we must allow the plea. WILLIAMS, J.—Assuming that the statute is imperative, can a party give himself a right to sue for wages in the superior court, by adding counts for an assault or any other cause of action? We must not assume that the assaults will be proved. COCKBURN, C. J.—I must confess I do not see why the defendant should not put this matter upon *the record.] This is a plea to the jurisdiction, [*701 and therefore too late. [WILLES, J.—It has been held to be a plea in bar.] It is submitted that the 189th section is applicable only where the claim is for wages simpliciter, and not where another cause of action is added. [WILLIAMS, J.—Before the Common Law Procedure Act, these causes of action could not have been joined. WILLES, J.—The real question is, whether this is not a plea which the judge might in his discretion decline to allow, upon the ground that it is vexatious.]

COCKBURN, C. J.—I think it would be hard upon this man, if he has well-founded causes of action, that he should be compelled to separate them, and to sue for one before the magistrates and for the others in the superior court. But still I think it is a question which the defendant has a right to raise, and that the proposed plea is not so frivolous or vexatious that he ought not to be allowed to plead it. The trial, however, must not be delayed.

WILLIAMS, J.—I also think the proposed plea should be allowed. The principle by which I have always been guided in these matters, is, that the defendant should be permitted to set up any reasonable defence. I think we have no discretion to disallow a plea because it sets up an unworthy ground of defence. I express no opinion as to the validity of the plea.

CROWDER, J.—I also think the plea should be allowed. On the assumption that the plea is a valid one, I should not consider that I had a discretion to refuse to allow it, on the ground that I disapproved of it morally. Whether the case is within the meaning of the statute is a matter, that is very fit to be considered; and it *will undergo [*702 full consideration if brought before us on demurrer. The point is certainly open to much argument.

WILLES, J.—I must own that I should have taken the same view of this matter that my Brother Byles took. This, as it seems to me, is a dilatory plea, which the judge may in his discretion decline to allow with others. I do not think we ought to assume that the counts for the assaults were put into the declaration for the purpose of evading the statutory prohibition. It is unnecessary to discuss the matter: all I

mean to say, is, that I should have taken the same view that my Brother Byles took. I think, however, that Mr. *Brett* will do well to consider whether he should not traverse that this is a suit for wages within the meaning of the statute. He might be beaten upon a demurrer, inasmuch as the court could only look at that particular breach.

COCKBURN, C. J.—All difficulty may be obviated by giving the plaintiff leave to reply and demur, as a judge at Chambers would do.

The rule was drawn up as follows,—“That the defendant be at liberty, before 12 o'clock to-morrow, to plead a plea on the 17 & 18 Vict. c. 104, ss. 188, 189, in addition to the pleas already pleaded in this cause; the plaintiff being at liberty to reply and demur thereto, to amend the record and pleadings if necessary, and to enter his record for trial with the associate on Saturday afternoon next,—the defendant by his counsel hereby undertaking to accept such notice of trial for the next sitting as the plaintiff shall be enabled to give.”

*703] ***THE WOLVERHAMPTON NEW WATERWORKS COMPANY v. HAWKSFORD.** *Jan. 29.*

Interrogatories under the Common Law Procedure Act, 1854, as to the contents of a lost document, supposed to have been executed by the party interrogated, allowed upon a *prima facie* case of loss being made out by affidavit,—subject to the probably unnecessary condition that the answers were not to be used at the trial unless such evidence was given of the loss of the document as to make secondary evidence of its contents admissible.

In an action for calls by a public company, the plaintiff was allowed to interrogate the defendant as to “whether and when he received from A. B. any writing relating to his becoming a director or shareholder, and what had become of it, and when and where he last saw it,”—the description of the writing being nothing more than was necessary for its identification.

THIS was an action brought to recover the amount of calls upon the defendant in respect of one hundred shares in the Wolverhampton New Waterworks Company, of which he was alleged to be the holder. The defendant having pleaded, amongst other things, that he was not a subscriber to the undertaking, application was made to Byles, J., for leave to deliver interrogatories to the defendant under the 51st section of the Common Law Procedure Act, 1854, of which the following, amongst others, were disallowed by the learned judge, on the ground (as was alleged) that it is not permitted to an interrogator to inquire into the contents of a written document, or as to whether the defendant executed any, without producing it,—

“No. 6. Did you subscribe or authorize any one to subscribe for you for 6000*l.* to the undertaking of the said company? and did you sign or execute, or authorize any one to sign or execute for you, a subscription-contract, or document as the subscription-contract required to be made before the company could go to parliament to obtain their act of parliament?

“No. 7. Did you know Robert Baker, who was a clerk to Mr. Corser & Underhill? Did you execute the said contract in his presence?

“No. 22. Did you ever, and when, receive from George Holyoake any writing relating to your becoming a director or shareholder? If yea, what has become of it? and when and where did you last see it?”

*704] *Mellish*, on a former day in this term, obtained a *rule calling upon the defendant to show cause why the above interrogatories

should not be allowed.—The affidavit of the plaintiffs' now attorney, upon which the rule was moved, after stating that the deponent, who had succeeded a Mr. Underhill, the former attorney of the company, never had the subscription-contract delivered up to him, and that he had been unable to obtain it or to discover in whose possession it was, proceeded thus,—“That the original subscription-contract was supposed to be in the possession of Mr. Underhill, the late solicitor to the said plaintiffs, or of the parliamentary agents, or of Mr. George Holyoake, the late chairman and a director of the company: that notice was given to the said defendant to admit the printed copy of the said contract filed in the Private Bill Office, but the said defendant neglected or refused to admit the same: that the best information the plaintiffs could obtain of the last possessor of the said original contract, was, that the same had been in the parliamentary agent's office for comparison with the copy filed, and that the same had been seen afterwards in the office of the said Mr. Underhill, and that the said Mr. Underhill denied the possession or knowledge of it at the time he was served with the subpoena, and he did on the 7th of January instant repeat such denial to the deponent.” The affidavit further stated that the defendant's name was advertised in the prospectuses issued by the company both before and after their act of incorporation (18 & 19 Vict. c. cli.) was obtained, as one of the directors; that the act of parliament required that the qualification of a director should be the possession of one hundred shares in his own right; and that the defendant's name appeared in the act as one of the directors.

Phipson showed cause.—The interrogatories in *question re- [*705 late to the contents of a written document. They are matters as to which the defendant could not be examined at the trial. The ground upon which it is sought to have these interrogatories administered, is, that the document to which they relate is supposed to be lost. Assuming that it is lost, that is no ground for this application. It may be found before the trial. The plaintiffs can only give secondary evidence of the contents, on proof to the satisfaction of the presiding judge that due search has been made for the instrument, and that it cannot be found. [CROWDER, J.—If such evidence is given at the trial, I do not see why the defendant's answers should not be relied on as secondary evidence.] The legislature never meant by these provisions to alter the rules of evidence. The proper course for the plaintiffs to pursue, will be, to subpoena the defendant, and, the judge being satisfied that secondary evidence ought to be received, to examine him as to the contents and execution of the deed. To allow this will be establishing a dangerous precedent. What is there to prevent the plaintiffs from giving the defendant's answers in evidence against him as an admission, upon the principle of *Slatterie v. Pooley*, 6 M. & W. 664,† without any proof of the loss of the deed? As to the twenty-second interrogatory, the objection to that is, that it is seeking to obtain the contents of a written document, without producing it. The interrogatory goes far beyond what is necessary for the identification of the document interrogated to.

Mellish, in support of his rule.—The objection to the sixth and seventh interrogatories is clearly untenable. The plaintiffs would not be entitled to use the answers at the trial, unless they showed that they had put

*706] themselves in a position to give secondary *evidence of the contents of the instrument. [WILLIAMS, J.—Like the examination of a person who is ill, under the 1 W. 4, c. 22: before the party can avail himself of the evidence, it must be shown that the witness is ill at the time of the trial. WILLES, J.—Cannot the defendant, as they do in Chancery, for further certainty refer to the deed? COCKBURN, C. J.—We can limit the rule, that the interrogatories shall be read only on proof given of the loss of the deed.] That will meet one of the defendant's difficulties. If the plaintiffs prove at the trial that the subscription-contract is lost, or give reasonable evidence of an unsuccessful search for it, that will let in secondary evidence, and then the defendant's answers to these interrogatories will be admissible; for, that would bring the case within the express words of the 51st section of the 17 & 18 Vict. c. 125, inasmuch as the defendant would be liable to be called and examined as a witness upon such matter. It is material for the plaintiffs to be informed beforehand whether or not the defendant did execute the contract. The very object of the statute was to enable the plaintiff thus to test his opponent's knowledge. The twenty-second interrogatory is framed in very general terms. It does not ask as to the contents of any letter, but merely whether any relating to the matter in dispute has been received by the defendant. It was cautiously worded in order to avoid extracting any admission from the defendant.

COCKBURN, C. J.—The only difficulty in this case is as to the admission of secondary evidence of the contents of the document in question without proper proof of its loss. A *prima facie* case of loss having been made out by the affidavit, I see no reason why the sixth and seventh interrogatories should not be allowed, care being taken that no *707] use is made of them at the trial *without previous proof of the loss of the subscription-contract, so as to entitle the plaintiffs to give secondary evidence of its contents. It must be made a part of the rule that the defendant's answers should not be read unless a foundation be first laid for the admission of secondary evidence. As to the twenty-second interrogatory, that seems to be in the ordinary form, to found an application to a judge for discovery under s. 50.

WILLIAMS, J.—The twenty-second interrogatory does not, I think, go beyond what is necessary for identifying the letter or writing as to which the defendant is interrogated. With respect to the sixth and seventh, I do not see why the benefit of the act should not be extended to a case of this sort, when satisfactory evidence is given of the loss of the instrument the contents of which are sought to be proved by secondary evidence. Probably, if we made no special order upon the subject, it would be taken to be an implied condition that the defendant's answers to these interrogatories should not be available unless ground were previously laid for the admission of secondary evidence. But, with that restriction, I am clearly of opinion that the interrogatories should be allowed.

CROWDER, J., and WILLES, J., concurring, Rule absolute.(a)

(a) The rule was drawn up as follows,—“that the plaintiffs be at liberty to deliver to the defendant, or to his attorney, the interrogatories in writing as originally numbered 6, 7, and 22, that were disallowed by Byles, J.,—the answers to the said 6th and 7th interrogatories to be given in evidence upon the trial of this cause, in the event only of the said plaintiffs being in a position to give secondary evidence of the subscription-contract therein mentioned or referred to.”

***BECKH v. PAGE and Another. Jan. 24.**

The defendants contracted to buy of the plaintiff "115 bales, containing 18,440 (or any less number that may arrive) East India hides, shipped per Ontario, Calcutta to Hamburg, and to be delivered at 11½d. per lb. round, but the wrappers to be charged at 8d. per lb." The ship having been compelled by stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, and were sold. The remaining 97 bales arrived, but the defendants refused to accept them:—Held, that the words "or any less number that may arrive," applied to the number of *bales*, and not merely to the number of *hides*, and consequently that the defendants were liable for not accepting the 97 bales.

THIS was an action brought to recover damages from the defendants for an alleged breach of contract in not accepting and paying for certain East India hides.

The first count of the declaration stated, that, by an agreement made between the plaintiff and the defendants, it was mutually agreed between them that the plaintiff should sell to the defendants, who should buy from the plaintiff, one hundred and fifteen bales, or any less number of bales that might arrive, of hides, in the said agreement described as East India hides, said to be very good Patna, and shipped in the ship Ontario at Calcutta, to Hamburg, and to be delivered in London, at 11½ per lb. round, but the wrappers to be charged at 8d. per lb.: That it was by the said agreement further agreed that the said hides were to be taken by the defendants with all faults and defects, but that the defendants were to have the benefit of any claim that might be recovered on the original policy of insurance between Calcutta and Hamburg, or on the policy to be effected between Hamburg and London; and that the said hides were to be invoiced at the landing weights from the Queen's beam, and to be at the risk and expense of the defendants from the time of being weighed, the weight of wrappers to be averaged by weighing those from a few bales, and the tare for rope to be estimated by stripping a few bales, and the usual draft to be allowed: That it was thereby further agreed, that, if the said ship should be lost, or should the ship bringing the hides from Hamburg be lost, the contract was to be null and void: That it was further agreed that any question or dispute that might arise upon that contract should be settled and [*709 *decided by the selling brokers: That it was thereby also further agreed that the price of the said goods was to be paid in cash on delivery, or within twenty-eight days from the last day of landing, allowing a discount of 2½ per cent.: Averment that neither of the said ships was lost, and that the said one hundred and fifteen bales of hides arrived by ship at London aforesaid, where the plaintiff was ready to deliver the same to the defendants on the terms aforesaid, whereof the defendants had notice; whereupon a question and dispute arose between the plaintiff and the defendants upon the said contract, which the plaintiff within a reasonable time in that behalf was willing to refer, and requested the defendants to refer, to the settlement and decision of the said selling brokers, and the said brokers were willing to settle and decide the same; and all things had happened and been by the plaintiff observed, which were necessary to entitle the plaintiff to have the said question and dispute settled and decided by the said brokers: Yet the defendants had wholly neglected and refused to allow the said question and dispute to be settled or decided by the said brokers, whereby the settlement and

decision of the said question and dispute had been greatly delayed, and could only be obtained at a much greater expense than if the same had been referred to the settlement and decision of the said brokers; and the plaintiff had also for a long period been deprived of the use of a large sum which he was and is entitled to according to the said contract; and that all things had happened and had by the plaintiff been observed and performed which were necessary to entitle the plaintiff to have the said bales of hides accepted and received and paid for by the defendants according to the said agreement, and the time for the defendants' so doing had elapsed before this action; yet the defendants had made *710] default in accepting, receiving, and paying for the said bales of hides, or any of them, and the defendants had wholly neglected and refused so to do, whereby the plaintiff had incurred great expense in warehousing and taking care of the said bales, and by the fall in the market-price and value of hides the same had become of less value to the plaintiff than the price so agreed to be paid for the same by the defendants.

There were also counts for goods bargained and sold, and for money found due upon accounts stated.

The defendants pleaded,—first, to the first count, that they were induced to make the said contract in that count mentioned, by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him,—secondly, to the first count, that the hides, the subject of the said contract, did not arrive as alleged,—thirdly, as to so much of the first count as alleged that the defendants neglected and refused to allow the question and dispute to be settled or decided by brokers, that no question or dispute arose between the plaintiff and the defendants upon the said contract, within the true intent and meaning of such contract,—fourthly, as to so much of the first count as in the introductory part of the last plea mentioned, that the plaintiff did not request the defendants to refer the said question and dispute to the settlement and decision of the said brokers, as alleged,—fifthly, as to the residue of the declaration, that they never were indebted as alleged,—sixthly, as to the residue of the declaration, that the defendants were induced to contract the debts therein mentioned by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Issue thereon.

The cause came on to be tried before Cockburn, C. J., at the sittings in London after Hilary Term, 1858, when a verdict was found for the *711] plaintiff; *but leave was reserved to the defendants to move to enter the verdict for them upon the construction of the contract. The following were the facts proved so far as they were material to raise the point reserved:—

The plaintiff is a merchant in London; and the defendants are hide and leather merchants in London.

On the 21st of February, 1857, the defendants entered into a contract with the plaintiff for the purchase from him of certain East India hides, as follows:—

“London, 21st February, 1857.

“Messrs. Page & Welch.

“Gentlemen,—We have this day bought, by your orders and for your account, of Messrs. E. Beckh & Co.

“P. B. 326/425, 100 bales, containing 15,600

“H. B. 1/15 15 “ “ 2,840

(or any less number that may arrive) East India hides, said to be very good Patna, shipped per Ontario, Calcutta to Hamburg, and to be delivered in London, at 11½d. per lb. round; but the wrappers to be charged at 8d. per lb. The hides to be taken with all faults and defects, but the buyers to have the benefit of any claim that may be recovered on the original policy of insurance between Calcutta and Hamburg, or on the policy to be effected between Hamburg and London: to be invoiced at the landing weights from the Queen's beam, and to be at the buyer's risk and expense from the time of being weighed; the weight of wrappers to be averaged by weighing those from a few bales. Tare for ropes to be estimated by stripping a few bales. Usual draft to be allowed.

"Should the above-mentioned vessel be lost, or should the ship bringing the hides from Hamburg be lost, this contract to be null and void.

"Any question or dispute that may arise upon this contract, to be settled and decided by the selling brokers.

*"Payment, cash on delivery, or within twenty-eight days from the last day of landing, allowing a discount of 2½ per cent. [*712

"ANNING & COBB."

The ship Ontario mentioned in the said contract originally sailed from Calcutta on or about the 12th of July, 1856, having on board one hundred bales of hides marked respectively P. B. 326/425, and fifteen bales of hides marked respectively H. B. 1/15.

The ship was compelled by stress of weather to put back to that place on or about the 9th of August, 1856, with damage to herself and cargo, including a portion of the hides so shipped as already mentioned.

The cargo was thereupon relanded, and a portion thereof sold as damaged. Amongst the portion so sold were sixteen of the said bales marked P. B. and two of the said bales marked H. B.

The ship Ontario sailed again from Calcutta on or about the 21st of November, 1856, having on board the residue of the said one hundred and fifteen bales, that is to say, eighty-four bales marked P. B. and thirteen bales marked H. B.; and the said eighty-four bales and thirteen bales respectively arrived in London about the 7th or 8th of May, 1857, and were tendered by the plaintiff to the defendants.

The plaintiff himself proved that the defendants at the time of making the contract were informed of the original shipment of the one hundred and fifteen bales, and that the plaintiff at that time was aware of the ship having put back to Calcutta with heavy average.

The defendants, at the close of the plaintiff's case, on these facts, contended that they were not bound to accept the said eighty-four bales and thirteen bales respectively, on the ground that, by the terms of the contract, they were not bound, under the circumstances, to accept any less number than one hundred and fifteen bales.

*The Lord Chief Justice declined to nonsuit, but reserved leave to move. [*713

The defendants then gave evidence, amongst other things, that, at the time of the contract, they were not aware of the ship having put back.

At the close of the whole case, leave to move to enter a verdict for the defendants on the traverse of the agreement and plea of never indebted was reserved,—the court to have power to make any amendments in the pleadings which the judge at Nisi Prius ought to have made.

The other points in the case were left to the jury, who found a verdict for the plaintiff, which was entered accordingly, subject to the above-mentioned leave reserved.

J. Wilde, Q. C. in Easter Term last, pursuant to the leave reserved, obtained a rule nisi to enter a verdict for the defendants "on the construction of the contract," or for a new trial on the ground that the verdict was against the evidence.

Montague Smith, Q. C., and *Unthank*, showed cause.—The contract is correctly described in the declaration: the words "or any less number that may arrive" apply to the "bales," and not to the "hides;" and the seller was under no obligation to deliver more bales than actually arrived. A "bale" is a thing well known in the trade as containing a definite number of hides, viz., 156. If there were any less number in a bale, it would be mere falsa demonstratio, and immaterial. The bales bought are ear-marked, and to be paid for at per lb. The words "or any less number that may arrive" certainly apply as much to the bales as to the hides. [WILLIAMS, J.—There is a difficulty in your construction, if you construe the language of the contract grammatically: *714] the description of the *subject-matter of the contract begins with the word "containing," and ends with "hides," the parenthesis being in the middle of the sentence.] The language certainly is not free from ambiguity: but, upon the whole, it is submitted that the construction contended for on the part of the plaintiff is the more reasonable one. There is no pretence for saying that the verdict was against the evidence.

J. Wilde, Q. C., and *Honeyman*, in support of the rule.—According to the correct grammatical construction of the contract, the words "or any less number that may arrive" apply to the hides, and not to the bales. It was an absolute contract for the sale of one hundred and fifteen bales, to contain an uncertain number of hides, about 17,940; and the defendants were not bound to accept any less number of bales. The verdict was clearly against the weight of evidence.

COCKBURN, C. J.—I am of opinion that this rule must be discharged. Although the language of the contract is not free from ambiguity, and perhaps according to its strict grammatical construction, the words within the parenthesis, "or any less number that may arrive," should be applied to the immediate antecedent, viz., the number of hides, yet, upon the whole, it seems to me to have been manifestly the intention of the parties that those words should apply to the entire subject-matter of the contract,—the bales and their contents: and consequently there is no ground for the contention of the defendants, that they were not bound to accept the less number of bales which arrived. As to the other ground of the motion, viz., that the verdict was against the weight of evidence, the whole matter seems to have been left to the jury in a manner which is not complained of, and I see no reason for being dissatisfied with the conclusion at which the jury arrived.

*715] *WILLIAMS, J.—I incline to think, that, according to the grammatical construction of the contract, the words "or any less number that may arrive," are applicable to the number of hides and not to the number of bales. The contract begins with specifying the number of bales, and then proceeds to describe the contents; and, in the course of that description, after giving the number of hides which

the bales are supposed to contain, the words within the parenthesis occur. It seems to me that these words of limitation or condition were intended to apply to the number of hides, and not to the number of bales. My Lord and my learned Brothers, however, have come to a different conclusion: and certainly the language the parties have used is not in any point of view susceptible of a strictly grammatical construction; they use the word "containing," which is more properly a word of present description, and is not properly applicable to that which is matter of contingency. The contingency of arrival is certainly more applicable to the bales than to the hides. Upon the whole, therefore, I concur with the rest of the court that the non-arrival of a portion of the bales did not justify the defendants in declining to accept those which did arrive. Upon the other point also, I concur in thinking that we ought not to disturb the verdict. There was evidence on both sides, and the direction is not complained of.

CROWDER, J.—I am of opinion that this rule should be discharged. The first objection is to the language of the contract, whereby the plaintiffs agree to sell to the defendants "115 bales containing 17,940 (or any less number that may arrive) East India hides;" and it is said, that, according to the grammatical construction of the contract, the words "or any less number that may arrive," apply to the hides, and not to the *bales. That seems to me to be a very strange proposition. There could be no doubt as to the meaning of the parties [*716 if the words were transposed, and the contract made to read thus,— "115 bales, containing 17,940 East India hides, or any less number that may arrive." I think it is plain that the parties meant "115 bales, to arrive, or any less number that might be on board." In holding that the words in question apply to the bales, I do not think we do any violence to the language of the parties. As to the other point, I agree with the rest of the court in thinking that there is no ground for our interference.

WILLES, J.—I am of the same opinion. As to the construction of the contract, I entirely concur with what has fallen from my Lord and my Brother Crowder,— "or any less number that may arrive" applies to all that is before enumerated, whether bales or hides.

Rule discharged.

(a) This judgment was affirmed by the Exchequer Chamber on appeal [5 Jur. N. S. 1405].

*LANCASTER and Another v. EVE and Another. Jan. 26. [*717

The presumption that that which is annexed to the soil becomes part of the soil, may be rebutted by circumstances showing the intention of the parties to the contrary.

The plaintiffs were possessed of a wharf on the Thames, in front of which was a pile which had more than twenty years ago been driven into the bed of the river by the then occupiers of the wharf, and had remained there without interruption from the Crown or the conservators of the river, and which was essential to the use and enjoyment of the wharf:—Held,—the fact of the ownership not being disputed,—that the court were justified in presuming that the pile had been placed there in virtue of an easement, with the consent of the owners of the soil, and that a sufficient possession remained in the plaintiffs to entitle them to maintain an action against the defendants for negligently running against and destroying the pile.

THIS was an action for an injury done to a pile, the property of the plaintiffs, in the river Thames.

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The declaration stated, that, at the time when, &c., the plaintiffs were possessed of a wharf near to and adjoining the river Thames, and of a certain pile of wood lawfully driven into the ground near thereto and in and by the side of the said river; and that the defendants were possessed of a barge, and had by their servants the care, direction, and management of the same, and were navigating and using it on the said river; yet that the defendants, by their said servants, took so little and such bad and improper care of their said barge, and governed, managed, navigated, and directed the same in so careless, negligent, and improper a manner, that the same, by and through the carelessness, negligence, unskilfulness, misdirection, mismanagement, and improper conduct of the defendants, by their said servants in that behalf, then with force and violence came and ran foul of and upon and against the said pile, and thereby broke, damaged, and injured the said pile, whereby the plaintiffs were put to and incurred great expense in repairing the said damage and injury, and in placing and fixing a new pile in the ground in lieu of the said pile so broken and damaged as aforesaid, and they were and are otherwise injured thereby.

The defendants pleaded,—first, not guilty.—secondly, that the plaintiffs were not possessed of the said pile,—thirdly, that the pile was at *718] the said time when, &c., *unlawfully driven and fixed into the soil and bed of the said river Thames, the same being a public and common navigable river and a common highway, and into and on a part thereof where the said river was so public and common and navigable and such common highway as aforesaid, and where all the liege subjects of our lady the Queen at the said time when, &c., had a right to and lawfully ought to and might pass and repass with and navigate and conduct their vessels and barges at their free will and pleasure at all times of the year; that the said pile of wood so driven and fixed was unlawfully and improperly obstructing the passage of the said part of the said river and highway; that the defendants, having occasion for their said barge to pass in and along the said part of the said river, as they were lawfully entitled to do, the said barge, against the will of the defendants and their said servants, was carried and driven by the force and pressure of the tide and stream thereupon and against the said pile of wood so there unlawfully being, and, the same then being old, infirm, and decayed, and unfit to be left in that position by the plaintiffs,—of which the defendants and their said servants had no notice,—the same became and was broken and injured as in the declaration mentioned; and that the damage and injury arose and was occasioned by means of the premises in that plea mentioned, and not otherwise.

The plaintiffs joined issue upon each of these pleas.

The cause was tried before Crowder, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiffs were possessed of a wharf on the Surrey side of the river Thames, opposite to which, about fifty yards from the shore, was a pile firmly driven about eight feet into the bed of the river. It did not appear by whom the pile was originally so fixed: but it was *719] *proved, that, about twenty years ago, the then occupiers of the plaintiffs' wharf had either repaired it or renewed it, and that it was exclusively used by the occupiers of the wharf, and was necessary to the enjoyment of the wharf in the mooring and navigating of craft

into the wharf for the purpose of loading and unloading, and that nobody had ever interfered with it. It was also proved that there were many other such piles on both sides of the river, which were used by other persons for similar purposes. The defendants' servants, in navigating their barge, negligently ran against and carried away the pile; and this was the injury complained of.

On the part of the defendants, it was submitted that the case came within the maxim "*Quicquid plantatur solo solo cedit*," and therefore that the plaintiffs or their predecessors had, by permanently fixing the pile to the soil of the river, abandoned all property in it, if ever they had any, to the owners of the soil, and consequently that the defendants were entitled to a verdict on not possessed.

For the plaintiffs it was insisted that there was ample evidence to warrant the jury in inferring that the pile was placed in its present position with the consent of the Crown or the conservators of the river, for the more convenient use by the plaintiffs of their wharf, and so remained their property.

The learned judge, who was not required by either side to leave anything to the jury, reserving the point of law, directed a verdict to be entered for the plaintiffs for the value of the pile.

Dowdeswell, in Michaelmas Term last, moved to enter a verdict for the defendants upon not possessed, or a nonsuit, or for a new trial. There was no evidence to warrant the assumption that the pile in question was the property of the plaintiffs. It was not shown that they placed it where it stood: and, even if it had been, by the act of fixing it permanently in the soil of the river, their property in it was altogether abandoned and gone. The law is thus laid down in *Amos & Feraud on Fixtures*, 2d edit. p. 9,—“It is a maxim of law of great antiquity, that, whatever is fixed to the realty is thereby made part of the realty to which it adheres, and partakes of all its incidents and properties. By the mere act of annexation, a personal chattel immediately becomes part and parcel of the freehold itself: *Quicquid plantatur solo solo cedit*. This proposition the reader will find laid down as a general principle in almost every one of the cases to which it will be necessary to refer in the course of the present work; and, indeed, many of the decisions proceed exclusively upon it. It is recognised in particular in the following authorities,—*Year Book*, 10 H. 7, fo. 2, 20 H. 7, fo. 13, 20 H. 7, fo. 26, Co. Litt. 53 a, *Herlakenden's Case*, 4 Co. Rep. 63, Bul. N. P. 34, *Lord Dudley v. Lord Warde*, Amb. 113, *Lawton v. Lawton*, 3 Atk. 13, *Elwes v. Maw*, 3 East 50, *Lee v. Risdon*, 7 Taunt. 190 (E. C. L. R. vol. 2), *Minshall v. Lloyd*, 2 M. & W. 459.† Now, every case in which there is a right of severing a thing from the freehold by virtue of the law of fixtures, is considered as an *exception* from this general rule. And the manner in which the law of fixtures operates in these cases may be explained in two ways,—either on the supposition that the chattel nature of the thing is still preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty. It will be found, upon an inspection of the cases, that, for some few purposes, as in favour of creditors, the chattel nature of the thing is retained after its

*721] *annexation; but that, for most purposes, its personal character is lost, and it becomes strictly freehold. The circumstance of the property being subject to a right of removal, and of being re-converted to a personal chattel, does not affect the nature and condition it has acquired of being incorporated with the realty." In Brooke's Abridgment, *Trespass*, pl. 23, it is laid down that, "if a piece of timber, which was illegally taken from J. S., has been hewed, *trespass* does not lie against J. S. for retaking it. But if a piece of timber which was illegally taken have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for, *by annexing it to the freehold it becomes real property*." In *Spark v. Spicer*, Lord Raym. 788, 1 Salk. 648, it is said by Holt, C. J., "If a man be hung in chains upon my land, after the body is consumed I shall have gibbet and chain." Again, in *Masters v. Pollie*, 2 Rolle 141, it is said, "If A. plants a tree in the land of B., the tree shall belong to B." So little property have the plaintiffs in this pile, that the conservators of the Thames might remove it at any time. (a) [COCKBURN, C. J.—It appears from the evidence that this pile was essential to the enjoyment of the plaintiffs' wharf. Might not the owners of the soil grant to the owners of the wharf a right to fix the pile therein under circumstances such as would enable the latter still to retain the ownership of the pile?] That would be an easement. There was no evidence here that the pile was the plaintiffs' or that they had anything to do with the placing it where it stood. [CROWDER, J.—I do not think there was any doubt about the ownership. Whatever be the rights and powers of the court

*722] of *conservancy, as between these parties the defendants were wrongdoers. WILLIAMS, J.—It is a fallacy to talk of easements. If an action is brought for the disturbance of stake-nets, it is founded upon the easement; but if they are carried away, the owner may maintain *trespass*.] The stake-nets never ceased to be the property of the owner: there is no *permanent* annexation of them to the soil. [COCKBURN, C. J.—In *Wood v. Hewett*, 8 Q. B. 913 (E. C. L. R. vol. 55), it is laid down, that, when a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder: but, whether, in a particular case, it has become so or not, may be a question on the evidence; and a jury may infer from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again.] That was the case of a movable fender in a mill-stream. [COCKBURN, C. J.—I think it is impossible for the court here to say that there was not some evidence of ownership to go to the jury. You yourself insisted at the trial that it was a question for the judge.] It was for the plaintiffs to insist upon the matter being left to the jury. [CROWDER, J.—You never suggested that there was not exclusive possession in the plaintiffs in point of fact, or that you had any other defence than this point of law.]

COCKBURN, C. J.—There is no pretence for a new trial upon the facts: but the rule may go as to the point of law.

Lush, Q. C., and *T. Salter*, now showed cause.—The proposition con-

(a) See the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii.

tended for on the other side, is, that, if the owner of a wharf drives a pile into the soil of a *navigable river, although it remains there for more than twenty or even forty years, and is necessary for [723 the carrying on the business of the wharf, the pile has ceased to be the property of the person who placed it there, and becomes the property of the Crown or of the person in whom the soil of the river is vested. That is a proposition which is not tenable. The soil of the river is vested in the Crown for the benefit of the public. An individual may prescribe for property or an easement in the soil as against the Crown. The mere fact of its being placed in the soil of another does not make a chattel cease to be a chattel; otherwise, what becomes of gas or water mains?(a) *Primâ facie*, that which is planted in or annexed to the soil becomes part of the freehold; but that is only a presumption. [COCKBURN, C. J.—Is not the presumption rather in favour of an easement?] The owners of the soil do not interfere. If the plaintiffs cannot sue for the injury to the pile, who can? [COCKBURN, C. J.—Will not an easement answer your purpose?] Yes. [COCKBURN, C. J.—I think we must assume that the plaintiffs placed the pile in the soil of the river for their own purposes, and that it has remained there for the long period shown by the evidence with the consent of the Crown or of those in whom the right to the soil is vested. I think we must hear what can be said in support of the rule.]

Pigott, Serjt., and Dowdeswell, contrâ.—By being annexed to the soil, the pile in question became part of the soil, by whomsoever placed there. In *Amos & Ferard*, p. 12, it is said: “It is observed by Britton, in treating of the right of property by accession, c. 33, *that [724 ‘property accrues from the fraud and folly of another: as, where persons, with an evil intent, or through ignorance, build with their own timber on another’s soil. The same may be applied to those who plant or engraft, also to those who sow their grain on another’s land without the leave of the owner of the soil. In such cases, what is built, planted, and sown, shall be the owner’s of the soil, upon presumption that they were given to him. For, in these cases, it would be a great encouragement to such builders, planters, or sowers, if what was built, planted, and sown, was not to belong to the owners of the soil, and especially if such structures are fixed, or the plants and seeds have taken root or nourishment.’” Whilst, therefore, this pile remained fixed to the soil, in the permanent manner described, it clearly belonged to the owners of the soil. What evidence was there here to justify the court, or a jury, in presuming a license to fix and a license to remove it? If the argument on the other side be sustainable, the defendants might be liable to two actions,—one by the owner of the soil, the other by the persons entitled to the supposed easement. The only question is, who was the owner of the pile. It could not belong to both. [*Lush.*—It is only the point of law that is reserved,—that the plaintiffs were not possessed of the pile, it being in the soil of the Crown.] This is not the nature of a tenant’s fixture: if it had been driven into the soil of the wharf, though for the more convenient use of the wharf, it could not have been removed. [COCKBURN, C. J.—I am unable to distinguish the reasoning of the court in *Wood v. Hewett*, 8 Q. B. 913 (E. C. L. R. vol. 55), from the circumstances of this case. In the course of the argument for the defendant

(a) These are invariably laid down under the authority of acts of parliament.

there, it was said, that, "if a man plants a tree in another's soil, or builds a wall upon it, the tree or wall becomes the property of the *landowner (*Empson v. Soden*, 4 B. & Ad. 655 (E. C. L. R. vol. *725] 24)): and the same principle applies here." Upon which *Colebridge, J.*, asks, "Why may not there have been, when the mill was built, a concession of rights by the owner of the meadow, which would make the fender to all purposes the property of the miller? Might not he acquire the easement of having his fender on the defendant's land?" And *Lord Denman* adds,—“It might have been understood by both parties that the fender should be considered a separable chattel. That is less likely to be the case with a tree, because the tree could not be removed without probably destroying it.” And his Lordship, in giving judgment, says,—“The question is whether, because the fender in this case had been placed on the defendant's soil, it became his property as a necessary consequence of its position. I am of opinion that such a consequence never follows of necessity, where the chattel is separable. This appears sufficiently from *Rex v. Otley*, 1 B. & Ad. 161 (E. C. L. R. vol. 20). The decision in *Mant v. Collins*, 8 Q. B. 916 (E. C. L. R. vol. 55), is so far an authority in point of law, as it shows, that, in a case of this kind, it is always open to inquiry how the article came to be in the place in which it is found, and what the parties intended as to its use; and the respective rights may be determined by the evidence on these points. In the present case, there were circumstances from which the jury might infer that the plaintiff had become entitled to have a fender, his own property, standing in the soil of the defendant; and there was no proof that the defendant had asserted any right derogatory to this privilege in the plaintiff. The argument from the nature of the thing decides nothing: the manner of its becoming connected with the soil may be merely accidental. If a heavy stone basin is placed on a man's land, it is not a fixture. If it sinks into the soil, and in that manner becomes *fixed, is it therefore a fixture? The rights in *726] such a case must always be subject to explanation by evidence.” And *Patteson, J.*, says,—“The general rule respecting annexation to the freehold is always open to variation by agreement of parties: and, if a chattel of this kind is put up so that the owner can remove it, I do not see why it should necessarily become part of the freehold, or why it should not be removable when the owner thinks fit, if it appears to have been so agreed.” There the fender was severable without altering the nature or character of the thing to which it was annexed. [*WILLES, J.*, referred to *Grymes v. Boweren*, 4 M. & P. 143, 6 Bingh. 437 (E. C. L. R. vol. 19), where it was held that a pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use or convenience.] A mill-stone, though capable of being removed without injury to the mill, has been held to be irremovable.(a) [*COCKBURN, C. J.*—We must look at the common sense of the thing. The pile was driven into the bed of the river, not for the benefit of the owners of the soil, but for the more beneficial use of the plaintiffs' wharf. It was essential to the navigation of the river.] It was for the plaintiffs to give evidence to rebut the necessary presumption arising

(a) See *Martyr v. Bradley*, 2 M. & Scott, 25 (E. C. L. R. vol. 28), 9 Bingh. 24 (E. C. L. R. vol. 23). That, however, turned upon the construction of the covenant.

from the pile being fixed to the soil, the ownership of which was not in them. This they altogether failed to do.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. Of course I do not mean to controvert or question the general proposition, that, whatever is annexed to the freehold becomes part of the freehold. But there may be circumstances to take a *case [*727 out of the general rule, as, for instance, where the thing is so annexed as to be severable without injury to the soil, and where there may have been an agreement between the owners of the soil and the owner of the chattel, that the chattel should be severable at the will and pleasure of the latter. I think there are circumstances here from which we may properly draw the inference that the pile in question was not placed in the bed of the river with a view to its permanent annexation to the freehold so as to become part of the freehold; but that it was placed there by virtue of an easement granted by the Crown or whoever had the right to grant it, to the occupiers of the adjoining wharf, for the more convenient use and enjoyment thereof. It seems to have been admitted at the trial that the plaintiffs or their predecessors in the enjoyment of the wharf had fixed the pile where it stood, and had had the use and benefit of it for a long series of years without there ever having been any interruption or any assertion of right to it by the Crown or by the conservators of the river. The fair inference, therefore, is, that the pile was driven into the bed of the river in the exercise and enjoyment of a right or easement, and that it never was intended that the Crown or any other body or person should acquire any right or property in it, but that it should continue the property of the occupiers of the wharf, with the right to remove it at their pleasure. I therefore think the plaintiffs' claim in this action is not impeded by the plea of not possessed.

WILLIAMS, J.—I am entirely of the same opinion. No doubt the maxim "*Quicquid plantatur solo solo cedit*" is well established: the only question is, what is meant by it. It is clear that the mere putting a chattel into the soil by another cannot alter the ownership of the *chattel. To apply the maxim, there must be such a fixing to the soil as reasonably to lead to the inference that it was intended [*728 to be incorporated with the soil.' The evidence showed that these piles were essential to the beneficial navigation of the river by persons passing up and down to the several wharves. I am not aware that there is anything contrary to law in those who possess wharves on the banks of the Thames driving piles or stakes into the bed of the river adjacent thereto, for the more convenient enjoyment of their right to navigate and use the river. It is unnecessary, however, to consider that. I entirely agree with the Lord Chief Justice in thinking that there was abundant evidence here to warrant the conclusion that the pile in question was planted in the soil of the river by the plaintiffs' predecessors,—though at what time did not distinctly appear,—with the consent of the Crown or the conservators of the river, not for the benefit of the soil, but in order to the more commodious enjoyment of the advantages of the wharf; and that it was so placed, not upon the terms that it should be considered as annexed to or incorporated with the soil, but for the purposes of navigation. That necessarily involves the conclusion that the owners of the pile are not bound to keep it there altogether, but

that they may remove it at their free will and pleasure. The case falls within the principle of *Wood v. Hewett*, 8 Q. B. 913 (E. C. L. R. vol. 55). The circumstances clearly show that this pile, like the fender there, was placed in the soil of the river, not for the purpose of incorporating it therewith, but for the more convenient use of the plaintiffs' wharf. I therefore think the plaintiffs are entitled, as in common justice they ought to be, to maintain an action and to recover damages for an interference with that which is indispensable to the enjoyment of their wharf.

*729] *CROWDER, J.—There was ample evidence to show that the pile was placed in the bed of the river for the purpose of the more convenient enjoyment of the plaintiffs' wharf,—for mooring and assisting barges coming to and going from the wharf for the purpose of loading and unloading. It appeared that more than twenty years ago there had been a pile there which had become decayed, and the pile in question had been substituted for it by the plaintiffs or the former tenants of the wharf. The point taken at the trial, was, that, by whomsoever placed there, the fact of its being permanently fixed to the soil caused it to become the property of the owners of the soil, and to cease to be the property of the plaintiffs. I reserved the point: and I must own that I entertained considerable doubt upon it. I now, however, entirely agree with the Lord Chief Justice and my Brother Williams in thinking that it is by no means a necessary consequence of the pile's being fixed to the soil of the river, that it ceased to be the property of the plaintiffs, and thereby became the property of the owners of the soil. There was evidence that numerous piles were placed up and down the river for the same purposes. There was, therefore, ample ground for inferring that there was an easement to place this pile in the river for the use and convenience of access to the plaintiffs' wharf. The plaintiffs, therefore, did not lose their property in it by placing it in the soil, inasmuch as it was placed there for their own purposes, and not for the purpose or with the intention of making it part of the soil.

WILLES, J., concurred.

Rule discharged.

*730] *TOWNE v. THE LONDON AND LIMERICK STEAM-SHIP COMPANY (LIMITED.) Jan. 15.

Service of a writ of summons upon a *director* of a joint stock company (limited), registered under the 19 & 20 Vict. c. 47, is not good service,—writs of summons not being within the 53d section of that act, but the service thereof upon joint stock companies being regulated by the 16th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.

A WRIT of summons was issued against the defendants, The London and Limerick Steam-Ship Company (Limited), a joint-stock company completely registered under the 7 & 8 Vict. c. 110, and subsequently registered with limited liability under the 19 & 20 Vict. c. 47.

The writ was served on the 19th of November upon one Francis William Russell, one of the directors of the company, in London, and judgment was signed, for want of appearance, on the 23d of December.

Honyman moved for a rule to show cause why the judgment should not be set aside, on the ground that there had been no due service of

the writ upon the company. The motion was founded upon an affidavit which stated, amongst other things, that the defendants are an Irish incorporated company carrying on their business at Limerick, in Ireland, where the office of the company is situated; that the company have not any office or place of business in England; that the business of the company is entirely carried on and conducted in Ireland; that the officers of the company were at the commencement of this action and still are daily to be found at the office of the company at Limerick; and that the company is solvent and has ample funds to meet all demands upon it.

The defendants being an incorporated company, the service upon one of the directors was no service. The mode of service in such a case is pointed out by the 16th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, which enacts that "every writ of *summons [*731 issued against a corporation aggregate may be served on the mayor or other head officer, or on the town-clerk, treasurer, or secretary of such corporation." The company having no office or place of business in England, are not within the jurisdiction of the English courts,—*Ingate v. The Austrian Lloyds*, 4 C. B. N. S. 704 (E. C. L. R. vol. 93); and therefore the service should have been on the secretary at the office of the company at Limerick—*Evans v. The Dublin and Drogheda Railway Company*, 14 M. & W. 142.† [*Holl*, who was instructed to show cause in the first instance, stated that he should rely upon the 53d section of the 19 & 20 Vict. c. 47, which enacts that "any summons or notice requiring to be served upon the company, may, except in cases where a particular mode of service is directed, be served by leaving the same, or sending it through the post, directed to the company at their registered office, or by giving it to any director, secretary, or other principal officer of the company."] A "writ of summons" is not a "summons" or "notice" within the meaning of that section. And, if it were, the present case would fall within the exception, it being a case in which "a particular mode of service is directed," viz., by the 15 & 19 Vict. c. 76, s. 16. The word "summons" may be satisfied by applying it to proceedings before justices under ss. 31 and 56. The 54th and 55th sections conclusively show that a "writ of summons" could not have been within the contemplation of the legislature. The 54th section enacts that "notices by letter shall be posted in such time as to admit of the letter being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice; and, in proving such service, it shall be sufficient to prove that such notice was properly directed, and that it was put in the post-office in such time as aforesaid." And the 55th section enacts that "any summons, notice, writ, or proceeding requiring authentication by the company, may *be signed by any director, secretary, or other authorized officer [*732 of the company, and need not be under the common seal of the company; and the same may be in writing or in print, or partly in writing and partly in print." [WILLKS, J.—What is meant by a "writ requiring authentication by the company? WILLIAMS, J.—It is singular that the 53d section, which applies to service of "summonses and notices," makes no mention of "writs," whilst the 55th section, which can have nothing to do with writs, does. The 153d section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, which relates to service of notices

upon a joint stock company, provides that "any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the company;" and the 139th section, which corresponds with the 55th section of the 19 & 20 Vict. c. 47, omits the word "writ." It would seem that the word "writ" has by mistake been inserted in the 55th section of the 19 & 20 Vict. c. 47, instead of the 53d section. COCKBURN, C. J.—The 8 & 9 Vict. c. 16, furnishes a strong argument that "summons" in the 53d section of the 19 & 20 Vict. c. 47, does not mean "writ of summons." In *Garton v. The Great Western Railway Company*, 27 L. J., Q. B. 375, which is the only authority bearing upon the subject, it was held that the service of a notice of action upon the superintendent of an office of a railway company at a traffic station, was not good service within the *733] Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. *c. 20, c. 138.(a) At all events, the 53d section of the 19 & 20 Vict. c. 47, does not apply here, because "a particular mode of service" is directed by the 15 & 16 Vict. c. 76, s. 16, for the service of a writ of summons upon a company, and therefore the case is within the exception in the 53d section of the 19 & 20 Vict. c. 47.

Holl, *contra*.—The word "summons" in the 53d section of the 19 & 20 Vict. c. 47, is sufficient to include a "writ of summons." The analogous process for the commencement of a suit in the county court would clearly be within that section: and it can hardly be supposed that the legislature meant to make any distinction in this respect between the process in the superior and the inferior courts. The mere fact of the word "writ" being found in addition to "summons" in s. 55, does not warrant the conclusion that "summons" in s. 53, does not include "writ of summons." A writ of summons is not the only writ known to the law: or it may be that that word is inadvertently inserted in s. 55. As to the argument that a particular mode of service of process upon a public company is directed by the 16th section of the Common Law Procedure Act, 1852,—the obvious answer is, that that act is not incorporated with or made part of the Joint Stock Companies Act, 7 & 8 Vict. c. 110, or the 19 & 20 Vict. c. 47; and the 53d section could only be intended to apply to cases where a particular mode of service is directed by that act or some act in *pari materia* with it. Besides, the 16th section is permissive only, not obligatory. [WILLES, J.—The mode of proceeding at common law to compel a corporation to appear to process, was, by serving the mayor or other head officer; and, if no *734] appearance were entered, the next process was a distringas to distrain them by their lands and goods: and, if they had no land or goods, there were no means of compelling them to appear: see *Tidd's Practice*, 9th edit. p. 121. To remedy that inconvenience, the 16th section of the 15 & 16 Vict. c. 76, enacts that "every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or

(a) Which is in the very words of the 135th section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.

secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred or other like district, or some peace officer thereof."'] If the legislature had intended by the exception in the 53d section of the 19 & 20 Vict. c. 47, to refer to the 16th section of the 15 & 16 Vict. c. 76, it is not reasonable to suppose that such intention would have been left to mere inference and conjecture.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute, on the ground that the service of the writ of summons upon Mr. Russell, one of the directors, was not a good service. The 16th section of the Common Law Procedure Act, 1852, authorizes the service of a writ of summons issued against a corporation aggregate to be made on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation. Here, the service was effected by delivering the writ personally to one of the directors. It is, however, contended that the 53d section of the 19 & 20 Vict. c. 47, authorizes service of a writ against an incorporated and registered joint stock *company, "by giving it to any director." But that section, [*735 when examined, will be found to apply only to "summonses and notices;" and there are summonses referred to in other parts of the act to which the words of the 53d section are more properly applicable. Independently of the 135th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16,—which is almost identical with the 53d section of the 19 & 20 Vict. c. 47,—I think the last-mentioned clause should be held not to embrace writs of summons issuing out of the superior courts. But, when I find that the 135th section of the 8 & 9 Vict. c. 16, makes express provision for the service of writs, as distinguished from summonses,—showing that the legislature, when they meant to include writs, did so by apt and express words,—and when I find the 53d section of the 19 & 20 Vict. c. 47, adopting the very language of the former provision, with the single exception of the word "writ," I think it is impossible to hold that they could have meant that a writ of summons should be included under the word "summons." It may be that the legislature purposely made this distinction because of the more serious consequences to the corporation of the one process over the other. For these reasons, I think the writ in this case has not been well served, and consequently that the proceedings should be set aside; but, as the point is one of novelty and some nicety, I think there should be no costs.

WILLIAMS, J.—I am of the same opinion. The service of the writ in this case is clearly bad unless justified by the 53d section of the 19 & 20 Vict. c. 47. The question, therefore, is, whether a "writ of summons" is within the language of that section. I am of opinion that it is not. The word "summons" may be satisfied by applying it to the ordinary proceeding *to bring the parties before justices. If the 53d section stood alone, I think it would be difficult to say that [*736 "summons" could mean "writ of summons." But there are other reasons why it should not comprehend it here. The 55th section introduces the word "writ:" and though it is not easy to say what is the meaning

of a "writ or proceeding requiring authentication by the company," still it is evident that something different from a "summons or notice" is meant. It is to be observed, too, that the statute affects to follow some systematic arrangement; and this series of clauses is introduced under the head of "notices," and not in the division headed "legal proceedings." It would seem, therefore, to be clear that the legislature had no intention by the 53d section to alter or interfere with the mode of service of legal process which had already been provided by a statute more appropriately adapted to it, viz., the Common Law Procedure Act.

CROWDER, J.—I am of the same opinion. Seeing the position which the 53d section occupies in the scheme or arrangement of the statute, and that it commences with the words "summons or notice," the natural conclusion would be that it was not meant to include a "writ of summons" for the commencement of an action in the superior court. And I cannot help thinking it would be somewhat singular if it did, seeing that the 16th section of the Common Law Procedure Act, 1852, had already provided for the service of writs of summons upon corporations; and there is no reason for supposing that the legislature meant to alter that by the later act. Besides, the 53d section of the 19 & 20 Vict. c. 47 expressly excepts from its operation "cases where a particular mode of service is directed." Now, the section of the Common Law Procedure Act to which I have adverted does direct a *particular mode
*737] of service of writs upon corporations. It uses, it is true, the word "may:" but that is directory as well as permissive. I am of opinion, therefore, that the service upon Mr. Russell was not such a service as is warranted by law, and consequently that the proceedings taken upon it must be set aside.

WILLES, J., concurred.

Rule absolute, with costs.

STUART and Another v. CAWSE and Another. Jan. 15.

The defendants, being indebted to the plaintiffs to the amount of 6*l.* 8*s.* 6*d.*, but insisting that they owed only 6*l.* 3*s.* 6*d.*, sent them a banker's draft for the latter sum, payable at seven days' sight. The plaintiffs procured the draft to be accepted, but wrote to the defendants, demanding the additional 5*s.*, and telling them, that, unless it was paid, they would return the draft. The defendants still refusing to pay the 5*s.*, the plaintiffs, retaining the draft, issued a writ for the 6*l.* 8*s.* 6*d.* The court stayed the proceedings on payment of the 5*s.*, without costs.

THE plaintiffs, dealers in London, in April, 1858, sent goods to the defendants, who were milliners at Plymouth, to the amount of 9*l.* 3*s.* 6*d.* Of this sum 3*l.* was remitted by the defendants; and, in October, the plaintiffs wrote to the defendants demanding the balance, claiming 6*l.* 8*s.* 6*d.*, which included 5*s.* charged for a packing-case, which the plaintiffs alleged had not been returned. The defendants, insisting that the case had been returned, sent the plaintiffs, by return of post, a draft for 6*l.* 3*s.* 6*d.* upon Sir John Lubbock & Co., bankers, London, payable seven days after sight, *which was presented by a clerk of the plaintiffs* on the 1st of November, and duly accepted by the bankers. The plaintiffs on the same day wrote again to the defendants demanding the additional 5*s.*, and stating, that, unless it were paid, they would return

the draft. The defendants declined to pay the 5*s.*, whereupon the *plaintiffs, *without returning the draft*, brought this action to [*738 recover the 6*l.* 8*s.* 6*d.*

Application was made, on behalf of the defendants, to Willes, J., at Chambers, to stay the proceedings on payment by the defendants of the 5*s.* without costs. His Lordship, however, declined to make any order.

Watkin Williams, in Michaelmas Term last, upon the authority of *Wellington v. Arters*, 5 T. R. 64, obtained a rule nisi in the terms of the rejected summons; against which

Raymond now showed cause.—The proceedings in *Wellington v. Arters* were stayed upon an affidavit by the defendant (which was uncontradicted by the plaintiff) that the debt did not amount to 40*s.* Here, however, there was an admitted debt of 6*l.* 3*s.* 6*d.*, independent of the disputed item of 5*s.* [CROWDER, J.—The 6*l.* 3*s.* 6*d.* had been paid by a draft which the plaintiffs had procured to be accepted.] The affidavits show that this was done by mistake, and that they have in fact repudiated the payment. At all events, the plaintiffs are entitled to have the opinion of a jury upon that. No case can be found in which the court has interfered to stay proceedings when it has been a matter of controversy whether the debt was under 40*s.* or not.

CROWDER, J.—I am of opinion that this rule should be made absolute. The action is in reality brought to recover 5*s.* only; and it is the duty of the court to stay the proceedings, it being obviously beneath its dignity to entertain a suit for so trifling an amount. The plaintiffs contend that the action is really brought to recover the whole debt, viz., 6*l.* 8*s.* 6*d.* The facts appear to be these:—The defendants remitted to the *plaintiffs a draft on Lubbock & Co.'s for 6*l.* 3*s.* 6*d.*, insisting [*739 that that was the entire debt. The plaintiffs' clerk took the draft (which was at seven days' sight) to Lubbock's for acceptance, and got it accepted; and, before it was due, the plaintiffs issued a writ for the full amount, 6*l.* 8*s.* 6*d.*, without returning the draft. Under these circumstances, I cannot say that more than 5*s.* was due at the time of the commencement of the action.

WILLES, J.—I also think this rule should be made absolute. I had in mind the case of *Hough v. May*, 4 Ad. & E. 954 (E. C. L. R. vol. 31), 6 N. & M. 535 (E. C. L. R. vol. 30), when the matter was before me at Chambers. There, however the defendant had sent his own check.(a) In the present case, the defendants remitted a draft on a banker, and the plaintiffs, by obtaining the banker's acceptance, have bound the money in the banker's hands. It is said that the plaintiffs repudiated the payment: but still they kept the draft: and it is by their actions, not by their declarations or their intentions, that men must be

(a) To assumpsit for work and labour in making a railing, the defendant pleaded, that, before the action, he had paid to the plaintiff the sum of 8*l.* 11*s.*, and the plaintiff had received and accepted the same in payment and discharge of 8*l.* 11*s.* The plaintiff replied that the defendant did not pay the plaintiff the said sum of 8*l.* 11*s.* in manner, &c. It was held that the defendant did not support his issue, by showing, that, before the action, he had sent the plaintiff a check on his banker for 8*l.* 11*s.*, stated in the body of the check to be "balance account railing;" and that the plaintiff held such check at the commencement of the action. A check so delivered, to operate as payment, must at any rate be unconditional. And (per Littledale, J.) a party to whom a check is sent may commence an action before he sends it back.

judged. The plaintiffs' right of action in respect of the 6*l.* 3*s.* 6*d.* *740] *was clearly suspended during the currency of the draft; consequently, the action is in reality brought only for the 5*s.* As, however, this is an appeal from the decision of a judge at Chambers, the rule must be absolute without costs.

Rule absolute without costs.

END OF HILARY TERM.

CASES
 ARGUED AND DECIDED
 IN THE
 COURT OF COMMON PLEAS,
 IN
 Hilary Vacation,

IN THE
 XXII. VICTORIA. 1859.

The Judges who usually sat in Banc at these sittings were :

WILLIAMS, J.	WILLES, J.
CROWDER, J.	BYLES, J.

LEGG v. CHEESEBROUGH and Another. Jan. 12.

To an action against them as the acceptors of a bill of exchange, the defendants pleaded a plea founded upon a deed of arrangement made by the defendants with their creditors, under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which had not been signed by the plaintiff, but which was said on the part of the defendants to be nevertheless binding on him by reason of its being executed by six-sevenths in number and value of their creditors.

The instrument was not a composition deed; but it contained a clause by which each of the creditors *parties to or bound by the deed* covenanted not to sue, impede, or molest the defendant: and then followed another clause, to the effect, that, if any creditor *by whom or on whose behalf the deed should have been actually executed*, should act contrary to that covenant, the defendant should be absolutely discharged from all claims and demands both at law and in equity, by such creditor:—

Held, that this latter clause was not binding upon the plaintiff,—it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general.

THIS was an action by the endorsee against the acceptors of two bills of exchange, each for 1000*l.*, drawn by one Edward Smith.

*Plea,—that the said bills of exchange were before the making [*742 of the deed thereafter mentioned respectively accepted by the defendants for and on account of the sums of money therein respectively mentioned, and had been and were before then respectively endorsed to the plaintiff, who was at the time of the making of the said deed the

holder thereof respectively: That, before and at the time of the making of the deed thereafter mentioned, and for six calendar months and upwards next immediately before the suspension of payment thereafter mentioned, the defendants carrying on business under the firm of William Cheesebrough & Son, were respectively traders liable to become bankrupt under the bankrupt laws and within the meaning of the statute thereafter mentioned: That, before and at the time of the making of the said deed, the defendants were indebted to the parties of the third part to the deed thereafter mentioned, and to divers other persons, in divers sums, and were and would be unable to pay the same in full: That the defendants, before the time of making the said deed, and after the passing and coming into operation of the Bankrupt Law Consolidation Act, 1849, to wit, on the 16th of December, 1857, as such traders, suspended payment; and afterwards, by deed of arrangement made after the passing and coming into operation of the said Bankrupt Law Consolidation Act, 1849, between the defendants of the first part, William Ackroyd, John Foster, Edward Townend, and William Quilter, of the second part, and the several persons, companies, and corporations who were respectively creditors of the defendants, or one of them, of the third part,—after reciting, amongst other things, the said suspension of payment by the defendants, and that a meeting of their creditors was holden on the 30th of December, 1857, and that, the defendants

*743] ^{*having represented to the said creditors that they were unable} to pay the amount of their respective debts in full, it was resolved and agreed that the business and affairs of the defendants should be wound up under inspectorship; and also reciting that the said William Ackroyd, John Foster, Edward Townend, and William Quilter had been appointed and had agreed to act as inspectors for and on behalf of the creditors of the defendants,—it was witnessed that the several creditors of the defendants, or of either of them, who were or should be parties to or bound by the said deed, did, and each and every of them did, by the said deed, give and grant unto the defendants and each of them free, full, and absolute liberty and license thenceforth to conduct, manage, and wind up their said joint trade, business, and affairs, and to collect, get in, sell, and dispose of all and every their wools, stock in trade, real and personal estate, debts and effects, and every part thereof, and also their respective separate private estates, chattels, effects, and property, both real and personal, under the inspection, and subject to the approbation, direction, and control of the said inspectors, and in such manner as the said inspectors should judge to be most conducive to the benefit of the creditors of the defendants, or of either of them, until the defendants, or either of them, should have broken or failed to comply with any of the stipulations or provisions in that deed contained and on their and his part to be observed and performed, unless the said deed should sooner become void by virtue of a certain provision thereafter in that behalf contained, and hereinafter mentioned: That each of the creditors of the defendants or either of them parties to or bound by the said deed, did thereby, for himself or themselves, and his or their heirs, executors, administrators, and successors, severally covenant, *744] ^{grant, and agree to and} ^{*with the defendants and their respective} executors and administrators, that he or they the said respective creditors would not, nor should his or their respective heirs, executors,

administrators, or successors, or any other person or persons by his or their authority or consent, sue, arrest, seize, attach, impede, or molest the defendants, or either of them, or their or his goods, estate, or effects, in any manner howsoever, or upon any pretence whatsoever (save and except as in the security proviso thereafter contained and hereinafter mentioned), unless and until the defendants or one of them should have so as aforesaid broken or failed to comply with any of the stipulations or provisions therein contained and on their and his part to be observed and performed; and, further, that, if any creditor or creditors by whom or on whose behalf the said deed should have been actually executed, or his or their executors, administrators, or successors, should in any manner act contrary to the said covenant and the true intent and meaning of the said deed, then the defendants, and each of them, and their respective heirs, executors, and administrators, should be and were for ever by the said deed absolutely discharged from all claims and demands whatsoever, both at law and in equity, of or by such creditor or creditors who should so act contrary to the covenant in that behalf contained as aforesaid; and that the said letter of license and the covenant thereinbefore contained as aforesaid, should and might be pleaded in bar to any such action or actions, or other proceedings at law or in equity, as a good and effectual release and discharge of and from the debts or debt of such creditors or creditor respectively, and all claims and demands in respect thereof: That it was by the said deed further covenanted and agreed that the defendants, and each of them, would, when requested so to do by the said inspectors, draw out and state just, true, and exact accounts in writing of [*745 all their joint and respective separate debts and credits, claims and demands, and property, estate, and effects, and of the several charges, outgoings, liens, and encumbrances upon or affecting the same respectively, and bring the said account to a close or balance, and would thereupon deliver such accounts, signed by them and him respectively, unto the said inspectors, or, if required, unto each of the said inspectors; and, further, that each of them the defendants would from time to time and at all times thereafter until the trusts and provisions of the said deed should be fully satisfied, use and exert his best and utmost endeavours, and afford every assistance in his power, under and subject to the direction and advice of the said inspectors, to collect and get in the estate, property, debts, and effects of them the defendants and each of them, for the benefit of their and his respective creditors, according to and in pursuance of that arrangement; and that they the defendants would not, nor would either of them, at any time thereafter, convey, pay away, alienate, dispose of, pledge, or encumber any of the real or personal estate, or effects then belonging to them or him, or to or in which they or he had any right, title, or interest, without the consent of the said inspectors, and would not without the consent of the said inspectors knowingly or willingly do or commit, or suffer to be done or committed, any act, deed, matter, or thing whatsoever whereby any of their several joint or separate creditors might have any additional security for his, her, or their demand or demands, or otherwise obtain any undue preference or advantage over any other or others of them: and it was by the said indenture further agreed and declared that all the moneys which should be realized from the sale, conversion,

and getting in of the said goods, property, debts, real and personal *746] *estate and effects, should be applied in manner thereafter and hereinafter mentioned, that is to say, in paying and discharging the costs, charges, and expenses of preparing and completing the said deed and the arrangement thereby contemplated, or incidental thereto, and of carrying the said arrangement, and the trusts, intents, and purposes of the said deed, and of all matters and things incidental thereto, into effect, including the fees, wages, and salaries of all accountants, clerks, servants, and other persons employed in the conduct and winding up of the said business, or the investigation of the affairs of the defendants; also all salaries and allowances which might be allowed by the said inspectors to any persons or person in respect of their or his services in or about the premises; and the surplus of the moneys produced by the said joint estate, and any surplus of the separate estate of either of the defendants, remaining after paying 20s. in the pound on all his separate debts, should be divided, as and when directed by the said inspectors, amongst the creditors of the said partnership rateably and proportionably according to the respective amounts of their debts, without any preference, until the creditors should have received 20s. in the pound, if the said moneys should be sufficient for that purpose; and any surplus of the joint estate of the defendants after paying the joint creditors 20s. in the pound, should be divided between the separate estates of the defendants respectively, according to their respective shares and interests therein; and the moneys produced by the separate estates of each of the defendants should be applied in or towards the liquidation of his respective separate debts and engagements rateably and proportionably; and such of the costs and expenses thereinbefore provided to be paid as should be incurred exclusively in respect of the joint estate or affairs of *the defendants, *747] should be paid exclusively out of the produce of such joint estate; and such of the said costs and expenses as should be incurred exclusively in respect of the separate estate or affairs of either of the defendants, should be paid exclusively out of the produce of such separate estate; and the remainder of the said costs, charges, and expenses should be paid out of the produce of the said joint and separate estates respectively, rateably, and in proportion to the respective amounts of such joint and separate estates: And it was by the said deed expressly declared and agreed that all and singular the joint and separate estates and effects, both real and personal, of the defendants, should be administered under the said inspectorship; and the moneys and assets of the said partnership firm and of the defendants respectively should in all respects be distributed, divided, and appropriated in accordance with the rules of English bankruptcy; and the same rights and equities should prevail and govern any disputes or questions amongst the said creditors, or between the said creditors and the said inspectors, or between the said creditor or the said inspectors and the defendants, as if the defendants had become and been adjudicated bankrupt on the said 16th of December, 1857, and as if the respective debts for which the creditors of the defendants, or of either of them, should be accounted creditors in value as is thereafter and hereinafter mentioned, had been the debts only proved under such bankruptcy; and every creditor should be accounted a creditor in value in respect of such amount only as should appear to be the balance due to him upon an

account fairly settled in manner directed by the 224th section of the said Bankrupt Law Consolidation Act, 1849: And the defendants did thereby, for themselves, their heirs, executors, and administrators, covenant with the said *inspectors, and also with the creditors parties thereto, their executors, administrators, and successors [*748 respectively, that, if at any time before the whole of the joint and separate estates and effects of the defendants should have been got in and converted into money, it should, in the judgment of the said inspectors, appear desirable, for better carrying out the liquidation intended to be provided for by the said deed, that the defendants should execute an assignment of their estates and effects to them the said inspectors, and if the said inspectors should, by notice in writing signed by them and left at the counting-house of the defendants, require the defendants to execute any such assignment, then that they, the defendants, or their or his executors or administrators, in case of the death of them or either of them, should and would forthwith, at the expense of the said trust-estate, convey, assign, assure, and deliver up unto the inspectors or trustees, or a trustee to be nominated by the said inspectors, and effectually vest in them or him all such parts of the estate and effects of the defendants, and of each of them, as should then remain unapplied to the ends and purposes aforesaid, for the use and benefit of all and every or such and so many of the joint and separate creditors of the defendants as should be entitled to the benefit of the said deed, according to their respective rights and interests as aforesaid; and thereupon the defendants, their executors and administrators, should be absolutely released and discharged from all and every the debt and debts, claims, and demands of all their said creditors who should have executed or become in any manner bound by the provisions of the said deed: And it was by the said deed further witnessed, that, in consideration of the premises in the said deed mentioned, the said several and respective creditors who were in any manner bound by the *provisions of the said deed, did thereby, for themselves severally [*749 and respectively, and for their several and respective partner and partners, and not one of them for the acts and deeds of the others or other of them, or for the acts and deeds of the heirs, executors, or administrators, partner or partners of the others or other of them, but each and every of them for himself and for his and her own acts and deeds, heirs, executors, administrators, and successors only, and for the acts and deeds of his and her partner or partners only, covenant, promise, and agree with and to the defendants, their heirs, executors, and administrators, that, immediately after the said deed should be discharged from the proviso thereafter contained and hereinafter mentioned making void the same, the defendants and each of them, their and his heirs, executors, and administrators, should be absolutely released, and that that covenant should operate and enure and might be pleaded in bar as a good and effectual release and discharge to them respectively of and from all and all manner of actions, suits, bills, bonds, debts, dues, accounts, sum and sums of money, judgments, extents, executions, claims, and demands whatsoever, both at law and in equity, or otherwise howsoever, which they the said creditors, or any of them, or their or any of their heirs, executors, administrators, and successors, then had, or thereafter should or might have, challenge, claim, or

demand against the defendants or either of them, their or his heirs, executors, or administrators, or estates and effects, or any of them, for or by means or on account of all or every or any of the debts to them or any of them the said creditors respectively due and owing from the defendants or either of them, or of any interest, exchange, or commission due or demandable for the same, or any other matter, cause, or thing *750] whatsoever in respect of the said debts *or any of them: Provided always, and it was thereby expressly declared, that, if in the opinion of the said inspectors, the defendants should at any time or times before the whole of their joint and separate estates and effects should have been fully realized and distributed, make default in performing all or any of the covenants, clauses, stipulations, and agreements thereinbefore contained and covenanted to be performed on their or his part, or if the said deed should not become binding on non-executing creditors under the provisions of the Bankrupt Law Consolidation Act, 1849, with reference to arrangements by deed, within the space of six calendar months after the day of the date thereof, then and in either of the said cases the said inspectors might, if they should think fit, by any writing under their hands, declare that the said deed, and the license and liberty, and every other article, clause, matter, and thing therein contained, so far as the same tended to restrain the said respective creditors of the defendants or either of them, or their or his respective heirs, executors, or administrators, from suing for and recovering the several demands, should cease, determine, and be absolutely void, anything thereinbefore contained to the contrary notwithstanding: Provided also, and it was thereby declared (and the same was the security proviso thereinbefore referred to as aforesaid), that the execution of the said deed by any of the creditors of the defendants, or either of them, or the exercise of the powers in and by the said deed given or reserved to the said inspectors, or given or reserved or permitted to be exercised by the defendants, or either of them, under the direction and control of the said inspectors, or otherwise, should not operate or extend to impeach, destroy, or in any way prejudicially affect any lien, right of administration, equity, or security which they respectively had or *751] claimed to *have, as bill-holders or otherwise, under the rules of law or equity relative to the administration or distribution of bankrupts' estates, or to take and have the judgment of any court of law or equity with respect to any such liens, rights, or claims as aforesaid, or to discharge any person or persons who was or might be jointly or concurrently liable with the defendants, or either of them, upon any bill or bills of exchange, or as surety or sureties, or otherwise, to the payment thereof, anything thereinbefore contained to the contrary notwithstanding; but all such liens, rights of administration, equities, and securities as aforesaid should continue in full force, and might be insisted upon and enforced by the said creditors respectively, notwithstanding the covenants and licenses on their parts thereinbefore contained; and, in the administration of the estates and funds of the defendants, all such liens, rights, equities, and securities respectively should be duly respected; but the value of securities on property of the defendants or either of them for any debt should be deducted from such debt, and a dividend should be payable under the said deed on the balance thereof only, unless such security should be given up: And it

was by the said deed lastly declared and agreed that the said deed was a deed of arrangement within the meaning of the 224th section of the Bankrupt Law Consolidation Act, 1849, and the several clauses and provisions of that act with respect to arrangements by deed were intended to be applicable thereto; and, if there should be any provision or direction therein which was not authorized or allowed by the said provisions of the said act to be introduced into a deed of arrangement thereunder, every such unauthorized provision or direction should be construed to operate as being intended to bind only the creditors by or on behalf of whom the said deed should be actually *executed, and their respective debts, claims, rights, and demands, and [752 should, as against all other creditors, be wholly void and inoperative. The plea then proceeded to aver, that no person was a creditor of the defendants or of either of them, at the time of the making of the said deed, who had become such creditor between the 16th of December, 1857, and the time of the making of the said deed; and that, before the commencement of the suit, the said deed was signed and sealed by the defendants and the said parties thereto of the second part: That the said deed was also signed and sealed by or on behalf of divers persons, companies, and corporations respectively creditors of the defendants, the same having been so signed and sealed by or on behalf of some of them before the commencement of the suit, and by or on behalf of the residue of them after the commencement of the suit: That the said creditors by or on whose behalf the same was so signed and sealed, were six-sevenths in number and value of the defendants' creditors within the meaning of the provisions of the said statute whose debts amounted within the meaning of the said provisions to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities and liens from the defendants, appeared to be the balance due to him: That, after the commencement of the action, the said deed became and was, and then was, signed and sealed by or on behalf of such majority of the defendants' creditors as aforesaid; and thereupon, after the same had been so signed and sealed by or on behalf of such majority, and after the commencement of the suit, *and before the plaintiff had declared therein,*(a) the defendants obtained from the Court of *Bankruptcy for the Leeds district,—being the court within the [753 district of which the defendants had resided or carried on business for six calendar months next immediately preceding their suspension of payment as aforesaid,—a certificate of the said court, certifying that the said deed had been duly signed by or on behalf of such majority of the defendants' creditors as aforesaid: That the plaintiff was at the time of the making of the said deed a creditor of the defendants in respect of the causes of action as to which that plea was pleaded, within the meaning of the said statute; and that, at the time of the making of the said deed, the amount in that plea mentioned was a debt due from the defendants to the plaintiff within the meaning of the said indenture: That the plaintiff had fourteen days' notice of and before the application to the said bankruptcy court for the Leeds district for such certificate as aforesaid, upon which application such certificate was

(a) These words were added upon the argument.

so obtained as aforesaid: That, after the said suspension of payment, and before the obtaining of such certificate as aforesaid, the plaintiff was requested by the defendants to sign and execute the said deed, and might, if he would have done so, have signed and executed the same as a party thereto of the third part: That the defendants had, from the time of the making of the said deed hitherto, in all respects performed and observed the covenants in the said deed contained, and that the said deed of arrangement still remained in full force, and that, by reason of the premises, and by force of the said statute, the said deed had become and was as effectual and obligatory in all respects upon the plaintiff as if he had duly signed and sealed the same; and that, by reason of the premises, the defendants had become and were released and discharged, in manner aforesaid, from the causes of action in the declaration mentioned.

*754] To this plea the defendants demurred,—the grounds of demurrer stated in the margin being, “that it does not appear by the plea that the deed had actually been executed by or on behalf of the plaintiff, and, unless it were, the covenant not to sue does not attach; and that the deed set out in the plea is not a binding deed of arrangement within the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.”

Montague Smith, Q. C. (with whom was *Honyman*), in support of the demurrer.—The first objection to the deed upon which the plea is founded, is, that it contains no assignment of the debtors' property, but leaves it in their possession, and liable to execution. All lies in covenant. The deed is in effect a letter of license, enabling the defendants to carry on the business and get in the debts, free from molestation. It has been laid down in several cases, that, to make a good deed under the 224th section of the Bankrupt Act, it must provide for the distribution of the estate for the benefit of all the creditors, as in bankruptcy: *Drew v. Collins*, 6 Exch. 670;† *Fisher v. Bell*, 12 C. B. 363 (E. C. L. R. vol. 74); *Tetley v. Taylor*, 1 Ellis & B. 521, 532 (E. C. L. R. vol. 72); *Bloomer v. Darke*, 2 C. B. N. S. 165 (E. C. L. R. vol. 89). The cases of *Macnaught v. Russell*, 1 Hurlst. & N. 611,† and *Irving v. Gray*, 3 Hurlst. & N. 34,† which will be relied on in support of the plea, do not show that such a deed as this would be valid. [WILLIAMS, J.—There is no assignment to anybody here: and a duty is imposed upon the inspectors to distribute the estate when they have got it.] The property remains liable to be taken by future creditors. It is true, the debtors covenant not to make away with or encumber the estate without the consent of the inspectors: but that does not meet the difficulty. The clause at the end of the deed only binds *those who execute it; *755] and that gives rise to another objection, viz. inequality of distribution. In *Ex parte Wilkes*, 5 De Gex, M’N. & G. 418, a deed of this sort was held to be bad. Lord Justice Knight Bruce there says: “I apprehend that a deed which neither is a deed of composition, nor does to the extent of the indebted trader’s means, or so far as circumstances will allow, provide in a reasonable manner some satisfaction, some effectual security, or some effectual protection for his creditors, ought not, according to a proper view of the six sections (the 224th and five following), to be considered as coming within the 224th.” And Lord Justice Turner says: “I agree in the construction which the courts

of law have put upon these clauses, that, in order to bring a deed within the operation of them, the whole estate must be given up to the creditors; and I think it must be so given up in all events, and not in certain events only, and in terms which are clear and unequivocal, and not open to future dispute and difficulty." In *Irving v. Gray*, the business was to be carried on *by the inspectors*, with power to avail themselves of the services of the debtors, who covenanted to join in all necessary acts. In delivering the judgment of the court, Channell, B., says: "We agree that the trusts of the deed must be such as to enure for the distribution of all the debtor's estate and effects amongst all his creditors. This court, in *Drew v. Collins*, 6 Exch. 670,† and the Court of Common Pleas in *Fisher v. Bell*, 12 C. B. 363 (E. C. L. R. vol. 74), decided that a deed of arrangement must provide for a distribution of all the trader's estate amongst all his creditors. The Court of Exchequer Chamber, in the case of *Tetley v. Taylor*, 1 Ellis & B. 532 (E. C. L. R. vol. 72), on a writ of error brought upon a decision of the Court of Queen's Bench (1 Ellis & B. 521), decided the same. This question was afterwards much discussed in the House *of Lords in the case of *Larpent v. Bibby*, 5 House of Lords Cases 481. It was not, however, then [*756 determined. The judges who heard the argument were not altogether agreed upon this point; and the case was decided on another ground. The Court of Common Pleas has, since the case of *Larpent v. Bibby*, viz. in the case of *Bloomer v. Darke*, 2 C. B. N. S. 165 (E. C. L. R. vol. 89), held that a plea of arrangement under the 224th section is not good, unless it shows on the face of it that the deed is for the distribution of the whole of the debtor's estate, and enures for the benefit of the whole of the creditors. No part of the trader's property is in terms, or, as we think, by necessary implication, excluded from the operation of the present deed, as was the case in *Drew v. Collins* and *Tetley v. Taylor*." "But the plaintiffs' counsel strongly contended, that, assuming an equal distribution to be contemplated by the deed, and so far provided for, the deed is yet invalid, because it contains no express conveyance or assignment by the debtors of all the debtors' estate, but at most a covenant to convey or assign when required by the inspectors, for the breach of which covenant the only remedy would be by action. This was the main objection urged to the validity of the deed. We are of opinion that this objection is not well founded, and that, although there is no actual conveyance or assignment of the debtor's property, the deed, if valid in other respects as a deed of inspection, is not invalid on that ground." And, after going through the cases, the learned Baron, speaking of *Ex parte Wilkes*, 5 De Gex, M'N. & G. 418, says,—“There was not in that case any conveyance or assignment of the trader's property. So far, that and the present case are, alike. But the Lords Justices appear to have thought that the power on the part of the trustees to take possession was not meant by the deed to operate in all events at *the discretion of the trustees, but only in certain events ex-pressed not in unequivocal, but in obscure or doubtful terms. [*757 Such a view does not, in our opinion, attach to the deed in the present case; and we think the case of *Ex parte Wilkes* is not an authority for the proposition for which it was urged at the bar, viz. that an actual conveyance or assignment is necessary to give effect to a deed of inspection.” The Court of Exchequer there held that there need be no express

conveyance or assignment of the debtor's property. But the inspectors were put into possession. Here, however, the whole scheme is, that the property shall be left in the possession and under the power of the debtors themselves. There is a further objection here, viz. that the deed provides that an assignment may be made if the inspectors require it,—giving a discretion in that respect to the inspectors, and not to the creditors. Then, there is this further proviso, that, upon the assignment being made, the debtors shall ipso facto be released from the claims of their creditors: but it is only in the event of some delict on the part of the traders that the inspectors could call for the assignment. A further objection to the deed, is, that there might be a distribution under it which would be a preference: the debtors covenant not to give a preference to any of their creditors, *without the consent of the inspectors*. They could not by their act or consent bind creditors who did not sign the deed. The next objection presents a point of some novelty. There is no release by the non-signing creditors: and the deed appears to have been designedly drawn with that view. The interim release, is limited to those creditors who actually execute the deed. The covenant not to sue may or may not operate as a release according to the intention of the parties: *Gibbons v. Vouillon*, 8 C. B. 483 (E. C. L. R. vol. 65); *758] *Willis v. De Castro*, 4 C. B. N. S. 216 (E. C. L. R. vol. 93). *758] [WILLES, J., referred to *Thimbleby v. Barron*, 3 M. & W. 211,† where it was held that a covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt.] *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63), also shows that whether the deed is to operate as an extinction of the debt or a mere temporary suspension of the remedy, must depend upon the intention of the parties. The language of the clause here is substantially the same as in the case of *Gibbons v. Vouillon*, 8 C. B. 483 (E. C. L. R. vol. 65); but the operation of the release is confined in terms to the persons who actually sign the deed. Upon principle, therefore, as well as upon authority, it is submitted that this deed does not enure as a release. The authorities upon this subject have recently been discussed in the Exchequer, in a case in which the court has taken time to consider. (a)

Mellish (with whom was *Bovill*, Q. C.), contra.—In order to arrive at a correct construction of the 224th and five subsequent sections of the 12 & 13 Vict. c. 106, it is necessary to bear in mind what was the state of things at the time of the passing of that act, and what was the inconvenience to be remedied. One of the modes by which an embarrassed trader obtained a release, was, by making an assignment for the general benefit of his creditors. That, however, was an act of bankruptcy. Another mode was, by a well-known class of deeds to wind up the estate under inspection. The main question here is, whether that sort of deed is within these provisions of the statute. It is impossible for the court to hold this plea to be bad, without overruling the decision of the Exchequer in *Irving v. Gray*, 3 Hurlst. & N. 34.† [WILLIAMS, J.—*759] **Irving v. Gray* is expressly in point, and binding upon us. CROWDER, J.—The matter was very much discussed in the House of Lords in *Larpent v. Bibby*, 5 House of Lords Cases 481.] In that case, the deed provided for the distribution of the debtors' estate only amongst those creditors who executed it. The deed in the present case

(a) *Snodin v. Boyce*, 4 Hurlst. & N. 391.† The decision turned upon a totally different point.

is not obnoxious to that objection. [COCKBURN, C. J.—In what respect does Mr. *Smith* say that this case is distinguishable from *Irving v. Gray*? *Smith*.—The inspectors there were to carry on the business. It is true, there was no absolute assignment of the property to them: but it was completely and entirely under their control: see the first and second clauses of the deed, 3 Hurlst. & N. 46, 47.† Whereas, here, the property remains entirely under the control and liable to the debts of the traders themselves. Besides, it is submitted that *Irving v. Gray* was not well decided.] The defendants' covenants in that case were substantially the same as those in this deed. [COCKBURN, C. J.—*Irving v. Gray* is the decision of a court of co-ordinate jurisdiction. I am not prepared to say that I should hold myself bound to follow a decision which I felt to be clearly mistaken: but, unless there be manifest mistake, we are bound to treat the judgment of another court with respect, and to follow it. But I must confess that *Irving v. Gray* seems to me to have proceeded upon right grounds. Some other objections to this deed have been pointed out; and to these your attention had better be directed. WILLES, J.—I see nothing in this deed to make it an answer to the plaintiff's claim. It was not complete at the time of the commencement of the action: the defendants cannot, therefore, rely upon the release clauses. COCKBURN, C. J.—This arrangement by deed was intended as a substitute for the ordinary proceedings in bankruptcy. It is the same thing, therefore, as if the defendants had become bankrupt pending the action. The difficulty, however, is this,—*bankruptcy operates as a stay of the action, but the creditor would [*760 be able to come in and prove. Here, the plaintiff, who brings his action before six-sevenths of the creditors have executed the deed, would be entirely ousted of his claim. I should incline to say that the continuing the action would be a "molestation."'] Looking at the whole of the deed, the plaintiff would still be one of the cestuis qui trust who would be entitled to share in the proceeds of the estate. The last clause of the deed expressly declares that it shall be a deed within the 224th and subsequent clauses of the Bankrupt Law Consolidation Act, 1849, and that, if there should be any direction or provision therein which was not authorized or allowed by the said provisions of the act to be introduced into an arrangement thereunder, every such unauthorized provision or direction should be construed to operate as being intended to bind only the creditors by or on behalf of whom the said deed should be actually executed, and their respective debts, claims, rights, and demands, and should, as against all other creditors, be wholly void and inoperative. Now, it could not be a deed within the 224th section unless the right of participation extended to *all* the creditors. [WILLIAMS, J., referred to the judgment of Maule, J., in *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 73), and, observing that this action was commenced before the deed had been executed by the required number of creditors, asked what course the plaintiff could or ought to have adopted when the deed *was* signed, by the sixth-sevenths.] He should have stayed his proceedings; or he might have applied for leave to discontinue without costs. The deed contains two releases, the first of which is conditional, the second absolute. [WILLES, J.—The latter seems to have been put in to avoid the difficulty suggested by the case of *Macnaught v. Russell*, 1 Hurlst. & N. 611.†] The *deed upon the face of it shows an [*761

intention to bind all the creditors, whether they execute it or not; and it could not have that operation unless all the conditions of the 228th section have been complied with. *Macnaught v. Russell* is directly in favour of the defendants, though some of the reasons given are not very satisfactory. [WILLIAMS, J.—The court held the deed to be good, and the plea good; whereas, if all the reasoning of the judges be good, it shows that the plea would be bad. WILLES, J.—The plea is assumed to have been a good plea of composition.] In *Irving v. Gray*, 3 Hurlst. & N. 34,† the deed contains the same provisions as are contained in the present deed. [COCKBURN, C. J.—The legislature no doubt intended that a deed of arrangement executed by six-sevenths of the creditors of the trader should be binding upon the rest. The question is, whether this deed carries out that intention,—whether the clause which provides, that, if any creditor by or on whose behalf the deed should have been actually executed should act contrary to the covenant not to sue, the defendants should be absolutely discharged from all claims and demands both at law and in equity by such creditor, includes those creditors who have not executed the deed.] In *Tabor v. Edwards*, 4 C. B. N. S. 1 (E. C. L. R. vol. 98), it was suggested, that inasmuch as the deed when executed by the proper number was binding upon all the creditors as if they had signed the same, it would not amount to a defence unless it contained an absolute and unconditional release. Looking at the whole deed, it is manifest that it was intended to operate as a good deed within the arrangement clauses of the 12 & 13 Vict. c. 106, and to bind all the creditors, and to be construed exactly as if all had signed it. [WILLES, J.—Assume that the covenant in question applies in terms to the plaintiff *762] and the other creditors who have not executed the deed,—“does not *Tetley v. Taylor* and that class of cases show that you cannot by a deed of this sort impose upon dissentient creditors something to which they would not be bound if the estate were being wound up in bankruptcy?”] *Tetley v. Taylor* and that class of cases are explained by the judgment of the Court of Exchequer in *Irving v. Gray*, 3 Hurlst. & N. 90.† To be a valid deed under the statute, it must provide for distribution as in bankruptcy. This deed satisfies that condition. In *Ex parte Calvert*, 27 Law J., Bankruptcy, 42, the deed contained provisions very similar to those of this deed: but the Lords Justices declined to pronounce any opinion as to its validity. At the close of his judgment, however, Lord Justice Turner explains the decision in *Ex parte Wilkes*, 5 De Gex, M’N. & G. 418. He says,—“The case *Re Wilkes* seems to me to have been pushed, in the argument of *Irving v. Gray*, far beyond, not only what was intended, but what was expressed. The judgment of the court in *Irving v. Gray*, however, takes a much more correct view of the case. All that was meant to be said in it was, that the property must be devoted to the creditors,—not that it must be assigned in trust for them.”(a)

Honyman, in reply.—Throughout the deed, there is a marked distinction between the covenants which are to operate upon the creditors who actually sign the deed, and the covenants which are intended to apply to those who do not execute: and the court is not now to be called upon to put a construction upon the deed which is manifestly

(a) At the suggestion of the court, *Mellish* consented to amend the plea by introducing the words at the bottom of page 752.

opposed to the intention of the parties. The clause which it is here sought to be made operative upon the plaintiff was *obviously [*763 meant to be confined in its application to those who actually executed the deed. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court:—

This was an action against the defendants as acceptors of a bill of exchange. The question before us arose on demurrer to the second plea, which was founded on a deed of arrangement made by the defendants with their creditors (under the 224th section of the Bankrupt Law Consolidation Act, 1849), which had not been signed by the plaintiff, but which was said on the part of the defendants to be nevertheless binding on him by reason of its being executed by six-sevenths in number and value of their creditors.

The instrument was not a composition-deed; but it contained a clause by which each of the creditors parties to or bound by the deed covenanted not to sue, impede, or molest the defendants; and then followed another clause, to the effect, that, if any creditor, by whom or on whose behalf the deed should have been *actually executed*, should act contrary to that covenant, the defendants should be absolutely discharged from all claims and demands, both at law and in equity, by such creditor.

This latter clause, according to the decision of this court in *Gibbons v. Vouillon*, 8 C. B. 483 (E. C. L. R. vol. 65), renders the deed operative as a defeasance pleadable in bar to an action brought by a creditor. The validity, therefore, of the plea depends on the question whether the clause is binding or not on the plaintiff, notwithstanding he did not execute the deed. And we are of opinion in the negative.

The distinction is carefully made by the language *to the instrument, between such creditors as are to be bound by the deed [*764 and such as actually execute it. As to the former, the deed is so worded that they do no more than covenant not to sue. But, as to the latter, the bringing an action is to amount to a defeasance.

It was argued, however, on the part of the defendants, that such a distinction is precluded by the language of the 224th section, which says that every such deed shall be as effectual and obligatory in all respects on all the creditors who shall not have signed such deed "as if they had actually signed the same."

On the other hand, it was contended that the clause in question was in its very nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general.

We are of that opinion. The expression so much relied upon by the defendants is used only to describe the operation and effect of the power given to the majority of the creditors to bind the minority, when the intention to exercise that power is expressed in apt words, and not with the view of restraining or expanding the proper meaning of the words which have actually been used.

We give the language relied upon full effect, by holding that those provisions of the deed which appear by the language used to have been intended, by the debtor and the creditors who sign, to bind the dissenting creditors, shall bind them; whilst those which appear by the language used to have been intended to bind the creditors who "actually" sign only, and not the dissenting creditors, shall not bind such creditors. This is so with the clause in question: and, even assuming it to be valid,

if applicable,—upon which we need not give an opinion,—it is for the above reasons inapplicable, and consequently the defence founded upon it fails.

*765] *This view is in accordance with the reasoning of the Court of Exchequer in *Macnaught v. Russell*, 1 Hurlst. & N. 611,† though in consequence of the objection being treated in that case as an objection to the deed only, and not to the plea, judgment was there given for the defendant. That must, of course, have been upon the assumption, that, if the deed was valid, the plea presented a defence by way of composition or release, independent of the defeasance. In the present case, however, our attention is called to the admitted fact that this plea furnishes no defence apart from the defeasance.

Our judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

HUGHES and Another, Churchwardens of St. Giles, Cripplegate, and KING and Another, two of the Inhabitants of the said Parish, Appellants; The REV. WILLIAM DENTON, Incumbent of the Church and District of St. Bartholomew, Moorfields, in the City of London, Respondent. *Feb. 12.*

The church of St. Bartholomew, Moorfields,—a church erected and endowed under the provisions of the 2 & 3 Vict. c. cvii.,—was built within the limits of the parish of St. Giles, Cripplegate, and the respondent was duly presented to the incumbency thereof. By an order in council in 1850, pursuant to the 59 G. 3, c. 134, s. 16, a particular district was assigned to the church so built, within the parish of St. Giles, Cripplegate, which was called “The district chapelry of Little Moorfields,” and authority was given to publish banns and to solemnize marriages, &c., in the said church, the fees for which were to be paid to the incumbent. In 1857, the vicar of St. Giles, Cripplegate, by a deed, to which the Dean and Chapter of St. Paul’s and the Bishop of London were parties,—reciting a local act of 7 G. 4, c. liv., whereby the tithes of the parish of St. Giles, Cripplegate, were extinguished, and in lieu thereof an annuity of 1800*l.* subject to the averages of the price of wheat, was secured to the vicar payable quarterly,—annexed to the church of the district chapelry of St. Bartholomew, Moorfields, one-sixth part of the annual sum to which he was entitled as vicar under the 7 G. 4, c. liv., to the intent that the respondent and his successors, perpetual curates of the said district chapelry of St. Bartholomew, Moorfields, should receive the one-sixth part thereby annexed:—

Held, that the extinguishment of the tithes of St. Giles, Cripplegate, and the substitution of an annual payment, by the local act, 7 G. 4, c. liv., did not prevent the legal annexation of a portion of such annual payment, under the provisions of the 1 & 2 W. 4, c. 45, s. 21.

Held, also, that, although the district chapelry of St. Bartholomew, Little Moorfields, had, by force of the provisions of the 19 & 20 Vict. c. 104, s. 14, become a separate and distinct parish for ecclesiastical purposes, the church of St. Bartholomew, Moorfields, still remained a church to which a district had been assigned, locally situate within the limits of St. Giles, Cripplegate, and was therefore capable of receiving the annexation made under the provisions of the 1 & 2 W. 4, c. 45, s. 21.

The 21st section of the 1 & 2 W. 4, c. 45, enacts that “the incumbent for the time being” of the district church “shall have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed” (including the case of the annexation of a part of the vicar’s annual revenues) “as the rector or vicar for the time being of the rectory or vicarage might have had if such annexation had not been made.” And by the 3d section of the local act, 7 G. 4, c. liv., the vicar is empowered, “in case any quarterly payment of the annual sum of 1800*l.*, or any part thereof, shall be in arrear and unpaid for twenty-eight days,” to obtain a warrant to levy the same on the goods of the churchwardens or any one or more of the inhabitants of the parish:—Held, that the incumbent of the district church had the like power of distress for the portion of the annual sum so annexed.

THE following case was stated by one of the Aldermen of the city of

London, pursuant to the 20 & 21 Vict. c. 43, for the opinion of the Court of Common Pleas:—

*By a public local and personal act, 7 G. 4, c. liv., intituled [766
 “An act for extinguishing titles and customary payments in lieu
 of tithes and Easter offerings within the parish of St. Giles, Cripplegate,
 in the liberties of the city of London, and for making compensation to
 the vicar for the time being in lieu thereof,” it was in the preamble
 recited, “whereas it will be beneficial to the inhabitants of the said
 parish that a certain annual stipend should from henceforth be paid to
 the vicar of the said parish for the time being in lieu and full satisfac-
 tion of all tithes and payments in lieu of tithes within the said parish,
 in manner and under the regulations hereinafter mentioned.”

By s. 1, it is enacted “that the churchwardens of the said parish for
 the time being shall from time to time for ever hereafter pay or cause
 to be paid to the vicar for the time being of the said parish, or to such
 persons as he shall appoint to receive the same, one clear annual sum of
 1800*l.* of lawful money of Great Britain, subject to such averages,
 according to the price of wheat from time to time, as hereinafter men-
 tioned, in lieu, *satisfaction, and discharge of all tithes and [767
 Easter offerings, or payments in lieu of tithes, to which such
 vicar is entitled within the said parish.”

By s. 3, it is provided, that, if the sum payable to the vicar is in
 arrear, on complaint by or on behalf of the vicar, a justice of the peace
 for the city of London is required to grant a warrant authorizing any
 person to be nominated by or on behalf of the vicar to levy such arrears
 by distress and sale of the goods and chattels of the churchwardens and
 inhabitants of the parish who had been summoned to answer.

By s. 8 it is provided, to the end that the churchwardens may raise
 and pay the said yearly sum of 1800*l.*, the churchwardens in vestry, or,
 in case either of them refuse, any twelve vestrymen, once a year or
 oftener, as they shall see occasion, shall proceed to make and sign a
 sufficient assessment, to be called the church-rate, upon all persons
 inhabitants and occupiers of lands, tenements, hereditaments, and
 premises within the said parish, except the vicar for the time being, for
 raising the said annual sum of 1800*l.* and such further sum of money as
 shall be necessary for repairing and keeping in repair the church of the
 said parish, and the churchyard belonging to the same, and for the
 payment of all necessary and proper salaries and disbursements relative
 to the said parish church and churchyard.

Section 28 contains a provision for reviewing the stipend every ten
 years, and altering it according to the average price of wheat.

Since the passing of the act, the vicar for the time being has received
 the said annual sum of 1800*l.* until the 18th of March, 1856, when the
 sum was revised according to the price of wheat, and reduced pursuant
 to s. 28, to the annual sum of 1421*l.* 15*s.* 8*d.*, which is the annual sum
 now payable under the aforesaid act.

*By the provisions of an act of parliament, 2 & 3 Vict. c. cvii. [768
 the Governor and Company of the Bank of England were em-
 powered to take down the church of St. Bartholomew, Exchange. The
 parish of St. Bartholomew, Exchange, however, was by the said act
 expressly preserved, and was united to the parishes of St. Margaret

Lothbury and St. Christopher le Stocks, the church of St. Margaret Lothbury being made the parish church of the three united parishes.

By the 86th section of the said act, the Governor and Company of the Bank of England, within twenty-one days after they have taken possession of the church of St. Bartholomew, Exchange, are to pay to the Archbishop of Canterbury and the Bishop of London a sum of money to be employed by the said archbishop and bishop in purchasing a site for and in erecting and endowing a church in the city of London or some parish adjoining thereto, the right of presenting to which church is by the said section vested in the Queen.

The church of St. Bartholomew, Moorfields, was built and endowed, and the Rev. William Denton has been presented to and now holds the incumbency of the said church under and by virtue of the provisions of the said act.

The attention of the court is particularly directed to sections 74 to 92, both inclusive, of the 2 & 3 Vict. c. cvi i.

In the year 1850, an order in council was obtained and published in the London Gazette of the 21st of June, 1850, of which the following is a copy:—

“At the court of Buckingham Palace, the 19th of June, 1850, present the Queen’s most excellent Majesty in council.

“Whereas, Her Majesty’s commissioners for building new churches have, in pursuance of the 16th section of an act passed in the 59th year of the reign of His Majesty King George the Third, intituled ‘An act *769] to amend and render more effectual an act passed *in the last session of parliament for building and promoting the building of additional churches in populous parishes,’ or under or by virtue of any other power or authority vested in them by the church-building acts, duly prepared and laid before Her Majesty in council a representation bearing date the 14th of May, 1850, in the words following, viz.

“‘Your Majesty’s commissioners for building new churches beg leave humbly to represent to your Majesty, that, having taken into consideration all the circumstances of the parish of St. Giles, Cripplegate, in the county of Middlesex, and within the diocese of London, it appears to them to be expedient that a particular district should be assigned to the consecrated church of St. Bartholomew, situate in Moor Lane, in the said parish of St. Giles, Cripplegate, under and by virtue of the power or authority for this purpose contained in the 16th section of an act passed in the 59 G. 3, intituled an act to amend and render more effectual an act passed in the last session of parliament for building and promoting the building of additional churches in populous parishes, or under and by virtue of any and every other power or authority in this behalf vested in your Majesty’s said commissioners by the church-building acts, and that such proposed district should be called The district chapelry of Little Moorfields, with boundaries as hereinafter mentioned.

“‘This district chapelry of Little Moorfields is bounded on or towards the north by the parish of St. Luke, Old Street, on or towards the east by the parish of St. Stephen, Coleman Street, on or towards the south by the said parish of St. Stephen, Coleman Street, and on or towards the west by the remaining part of the said parish of St. Giles, Cripplegate, from which the said district chapelry of Little Moor-

fields is separated by a line passing up the middle of Aldermanbury *Postern into Fore Street, and then turning north-westerly up the middle of Fore Street as far as Milton Street, and north- [*770 easterly up the middle of Milton Street as far as the boundary line of the said parish of St. Luke, Old Street, as such district chapelry is more particularly delineated on the map or plan hereunto annexed, and thereon coloured pink.

“ ‘Your Majesty’s said commissioners beg leave further to represent to your Majesty that it also appears to them to be expedient that banns of marriage should be published, and that marriages, baptisms, and churchings, and also burials, upon a burial-ground being provided for the said district chapelry, should be solemnized and performed in the said church of St. Bartholomew in Moor Lane aforesaid, and that the fees to arise therefrom should be paid and belong to the incumbent thereof for the time being: that the consent of the right Hon. and Right Rev. Charles James, Lord Bishop of the said diocese of London, has been obtained thereto, as required by the act and section hereinbefore mentioned, in testimony whereof the said Charles James, Bishop of London, has signed and sealed this representation :

“ ‘Your Majesty’s said commissioners therefore humbly pray that your Majesty will be graciously pleased to take the premises into your Royal consideration, and to make such order in respect thereto as to your Majesty in your Royal wisdom shall seem meet.’

“ Her Majesty having taken the said representation, together with the map or plan thereunto annexed, into consideration, was pleased, by and with the advice of Her privy council, to approve thereof, and to order, as it is hereby ordered, that the proposed assignment be accordingly made, and the recommendations of the said commissioners in respect of the publication of banns and the solemnization of marriages, baptisms, *churchings, and burials, and the fees arising there- [*771 from, be carried into effect agreeably to the provisions of the said acts: and Her Majesty by and with the like advice, is pleased to direct that this order be forthwith enrolled pursuant to the said acts, and registered by the registrar of the diocese of London.

“ W. L. BATHURST.”

The said church of St. Bartholomew in Moor Lane, with the district assigned to it, as stated in the said order in council, is situate within the original limits of the said vicarage of St. Giles, Cripplegate; and the Rev. William Denton as aforesaid was duly appointed incumbent of the said church and district.

The inhabitants of the district of St. Bartholomew, Moorfields, are elected to and serve upon the select vestry for the parish of St. Giles, Cripplegate; and a considerable number of the said vestry consists of persons residing within the district of St. Bartholomew, Moorfields. The inhabitants of the said district are also liable to pay, and do in fact pay, their share of a sum in the nature of a rate raised annually in the said parish under the authority of the 7 G. 4, c. liv., not only for the payment of the before-mentioned composition to the vicar in lieu of tithes, but also for the payment of the expenses of the church of St. Giles, Cripplegate, and of the salaries of the various parish officers of the said parish of St. Giles, Cripplegate, and other expenses mentioned in the 8th section of the last-mentioned act.

Banns of matrimony and the solemnization of marriages, churchings, and baptisms, according to the laws and canons and customs of the established church, have been since the said order in council, and are, authorized to be published and performed in the said consecrated church of St. Bartholomew, Moorfields: and the incumbent of the said church was by such authority entitled for his own benefit to the entire *fees arising from the performance of such offices, without any reservation thereout: and the said Rev. William Denton has, without any reservation, always received the same so far as they arise from the performance of the ceremony of marriage, but has never received any fees either for baptisms or for churchings, having declined to receive the same.

By the 95th section of the 2 & 3 Vict. c. 107, the purchase-money arising from the sale of a certain house is to be paid to the governors of Queen Anne's bounty, to be by them invested (until it can be conveniently invested in real property) in the 3 per cent. Consols, or 3 per cent. Reduced Bank Annuities, in trust, after certain trusts which have long expired, to pay the dividends to the minister of the new church contemplated by the act to be erected as aforesaid.

Pursuant to this section, a sum of 9934*l.* 14*s.* 4*d.* has been invested by the governors of Queen Anne's bounty in the 3 per cent. Reduced Bank Annuities upon the trusts stated in the above-mentioned section; and the dividends from the same, amounting to the clear annual sum of 298*l.* 0*s.* 8*d.*, have been for several years, and are now, annually payable to and received by the said Rev. William Denton as minister of the district church of St. Bartholomew, Moorfields, which is the new church contemplated by the act to be erected.

The surplice-fees payable to the said Rev. William Denton, and paid to him, have exceeded the sum of 15*l.*, and not exceeded the sum of 20*l.*, during each of the years 1855, 1856, and 1857.

The said Rev. William Denton has engaged a curate, deeming his services necessary for the district, of which the population is between 4500 and 5000, and pays him annually the salary of 130*l.* per annum. He also pays voluntarily various other sums annually towards the expenses of the church service, amounting in all to the sum of 98*l.* a year.

*On the 25th of May, 1857, an indenture was made and executed by the respective parties described as parties thereto, in the words following:—

“This indenture, made the 25th day of May, 1857, between the Rev. Philip Parker Gilbert, clerk, M.A., vicar of the parish church of St. Giles, Cripplegate, in the city and diocese of London, of the first part, the Very Rev. Henry Hart Milman, D.D., dean of the cathedral church of St. Paul in London, and the chapter of the same church, patrons of the said vicarage, of the second part, the Rt. Hon. and Rt. Rev. Archibald Campbell, Lord Bishop of London, of the third part, and the Rev. William Denton, clerk, M.A., incumbent of the perpetual curacy of the district chapelry of St. Bartholomew, Moorfields (a church within the limits of the said vicarage of Cripplegate), of the fourth part: Whereas, by an act of parliament made and passed in the seventh year of the reign of His Majesty King George the Fourth, and intituled ‘An act for extinguishing tithes and customary payments in lieu of tithes and Easter offerings within the parish of St. Giles, Cripplegate, in the

liberties of the city of London, and for making compensation to the vicar for the time being in lieu thereof,' it was, among other things, enacted that the churchwardens of the said parish for the time being should from time to time for ever thereafter pay or cause to be paid to the vicar for the time being of the said parish, or to such person as he should appoint to receive the same, one clear annual sum of 1800*l.* of lawful money of Great Britain, subject to such averages according to the price of wheat from time to time as thereafter mentioned, in lieu, satisfaction, and discharge of all tithes and Easter offerings, or payments in lieu of tithes, to which such vicar was entitled within the said parish, which said clear annual sum of 1800*l.* should be paid by four quarterly *payments, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December in every year; and [*774 that the same annual sum of 1800*l.* should be free and clear from all deductions, and exempt from all taxes, rates, and assessments whatsoever, parliamentary or otherwise: And whereas the said Philip Parker Gilbert is desirous of charging the said vicarage of St. Giles, Cripplegate, for the benefit and support of the church of he said district chapelry of St. Bartholomew, Moorfields, to the extent and manner hereinafter mentioned: Now this indenture witnesseth, that, in pursuance and exercise of the power in this behalf given or created by an act of parliament made and passed in the 1st and 2d years of the reign of His late Majesty King William the Fourth, intituled 'An act to extend the provisions of an act passed in the 29th year of the reign of His Majesty King Charles the 2d, intituled An act for confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies, and for other purposes, and of every other power enabling him in anywise in this behalf, the said Philip Parker Gilbert, with the consent of the said Archibald Campbell, Lord Bishop of London (as the bishop in whose diocese the said vicarage of St. Giles, Cripplegate, is situate), and of the said dean and chapter of St. Paul's (as patron of the said vicarage), testified by their respectively executing these presents, doth hereby, from and after the 24th day of June next, for ever annex unto the church of the said district chapelry of St. Bartholomew, Moorfields, one equal sixth part of the said annual sum of 1800*l.*, or of such other sum as shall from time to time be payable to the vicar for the time being of the said church of St. Giles, Cripplegate, by virtue of the said act of His Majesty King George the 4th, to the intent that the said William Denton and his successors, *per- [*775 petual curates of the said district chapelry of St. Bartholomew, Moorfields, may, from and after the 24th of June next, receive and enjoy the said one-sixth part expressed to be hereby annexed to the church of the said district chapelry, and may have and exercise all the same remedies for recovering and enforcing payment thereof as the said Philip Parker Gilbert and his successors, vicars of the church of St. Giles, Cripplegate, aforesaid, might have had if these presents had not been made: And the said Philip Parker Gilbert doth hereby declare that it is intended that these presents shall be forthwith deposited in the registry of the diocese of London aforesaid, conformably with the provisions in that behalf contained in the said act of His late Majesty King William the Fourth. In witness whereof the said dean and chapter in their chapter-house have caused their common seal to be

affixed, the said Archibald Campbell, Lord Bishop of London, hath set his hand and caused his episcopal seal to be affixed, and the said other parties hereto have set their hands and seals, the day and year first above written."

(Signed and sealed.)

This indenture was made without any notice to or consent from the present churchwardens or other the inhabitants of the said parish of St. Giles, Cripplegate.

Since the making of the said indenture, two quarterly portions of the said annual sum have become due, viz. at Michaelmas and Christmas, 1857.

The Rev. William Denton has demanded of the churchwardens of the said parish one-sixth part of such quarterly portions as being due to him under the said indenture. The said churchwardens have not paid the same to him; and the said one-sixth part of such quarterly portions was more than twenty-eight days in arrear at the time of the complaint hereinafter mentioned. The said vicar of St. Giles, Cripplegate, *776] has not demanded the said one-sixth part to be paid to him or to the said Rev. William Denton, and has declined to interfere in the matter in any way. There is one churchwarden annually appointed for the parish or district belonging to the church of St. Bartholomew, Moorfields.

On the 25th of February, 1858, the said Rev. William Denton appeared in person before one of Her Majesty's justices of the peace for the city of London, at the Guildhall of the said city, and complained that the said two quarterly portions of the sum so annexed as aforesaid were in arrear and unpaid, and prayed that William Nightingale Hughes and John Nind, the two churchwardens for the time being of the said parish of St. Giles, Cripplegate, and William King and George Cuthbert, two of the inhabitants of the same parish, might be summoned to answer the premises; and thereupon the said justice granted a summons in due form, which was served on the said churchwardens and inhabitants by a person nominated on behalf of the said Rev. William Denton.

The said complaint, on the 1st of March, 1858, came on to be heard before Mr. Alderman Humphery, at the Guildhall of the city of London; and the said Rev. William Denton and the said churchwardens and inhabitants then attended before him, with their respective counsel and attorneys, and the above-mentioned facts were then proved or admitted.

On behalf of the applicant, it was urged, that, by virtue of the order in council, the church of St. Bartholomew, Moorfields, was a district church or chapel, and had a district assigned to it; that, consequently, the indenture annexing to the said church one-sixth part of the annual sum payable to the vicar of St. Giles, Cripplegate, was valid under the statute 1 & 2 W. 4, c. 45, s. 21; and that, by virtue of the indenture *777] and *the last-named statute, a justice of the peace for the city of London was authorized and required, on the application of the said Rev. William Denton, to grant a warrant to levy the arrears of the one-sixth portion of the said annual sum so annexed as aforesaid, if for more than twenty-eight days unpaid to the said Rev. William Denton, by distress and sale of the goods of the churchwardens of St. Giles, Cripplegate, and other inhabitants of the same parish, as he would have been required to do on the application of the said vicar, had the deed of annexation not been made.

For the defendants it was contended, that, by the statute 19 & 20 Vict. c. 104, the district to which the church of St. Bartholomew, Moorfields, belonged, had at the time of the executing the indenture become a separate and distinct parish for ecclesiastical purposes, and consequently was incapable of receiving an annexation of tithes or other revenue under the statute 1 & 2 W. 4, c. 45, s. 21,—secondly, that, without reference to the statute 19 & 20 Vict. c. 104, the statute 1 & 2 W. 4, c. 45, did not make the indenture valid so as to annex the one-sixth part of the annual sum payable to the vicar of St. Giles, Cripplegate, to the district church of St. Bartholomew, Moorfields,—thirdly, that, assuming that the indenture was valid so as to annex the said one-sixth part to the said district church, the incumbent of the said district church had not any summary power of recovering the arrears; and a justice of the city of London was not authorized to grant his warrant to levy the same on the goods of the said churchwardens and inhabitants.

The alderman took time to consider the case: and on the 3d of March, 1858, he gave his decision, and stated his opinion as follows, viz. "I was of opinion that the church of the district chapelry of St. Bartholomew was a chapel having a district assigned to it, within the meaning of the 21st section of the 1 & 2 W. 4, c. 45, and that therefore the deed which had been executed by the vicar, dated [*778 the 25th of May, 1857, was a valid deed, and made in conformity with the provisions of that section of the act of parliament. I was also of opinion that I was enabled, under the powers vested in me by the 7 G. 4, c. liv. ss. 1 and 3, to direct a warrant authorizing the recovery of the arrears claimed by the Rev. William Denton, the incumbent. I was also of opinion that the district assigned to the church of St. Bartholomew was not a separate and distinct parish, and that it was not separated from the parish of St. Giles, Cripplegate. And I considered, therefore, that the vicar legally exercised the power vested in him, notwithstanding the provisions in the 14th and 15th sections of the 19 & 20 Vict. c. 104." And he thereupon granted his warrant to levy the said arrears on the goods of the said churchwardens and inhabitants.

F. Russell, for the appellants, submitted,—that the deed of annexation was not valid in law; that, by the statute of 19 & 20 Vict. c. 104, the district assigned to the church of St. Bartholomew had at the time of executing the said deed become a separate and distinct parish for ecclesiastical purposes; consequently, that the said church had ceased to be a church or chapel capable of receiving an annexation of tithe or other revenue under the statute 1 & 2 W. 4, c. 45, s. 21; that, without reference to the statute 19 & 20 Vict. c. 104, the statute 1 & 2 W. 4, c. 45, did not empower the said vicar of St. Giles, Cripplegate, to annex to the said church of St. Bartholomew the one-sixth part of the annual sum payable to him under the said first-recited local act; and that the justice was not authorized, on the application of the incumbent of the said church, to grant a warrant to levy any arrears of the said one-sixth *part so assumed to be annexed as aforesaid, by distress and sale of the goods of the churchwardens or other [*779 inhabitants of the said parish of St. Giles, Cripplegate.

Coleridge, for the respondent, contended, that, by the operation of the 59 G. 3, c. 134, s. 16, 58 G. 3, c. 45, s. 16, and 1 & 2 W. 4, c. 45, s.

21, the Rev. P. P. Gilbert had power to annex to the district church or chapel of St. Bartholomew, Moorfields, a portion of the annual revenue belonging to the vicarage of St. Giles, Cripplegate; that the power was not taken away by the operation of the 19 & 20 Vict. c. 104; that, consequently, the deed of annexation was valid in law; and that the justice was therefore authorized in granting his warrant according to the powers given him by the Cripplegate Act, 7 G. 4, c. liv. s. 3.

Cur. adv. vult.

CROWDER, J., now delivered the judgment of the court:—

This was an appeal against the decision of a magistrate, whereby a warrant was granted to the respondent to levy the arrears claimed by him under and by virtue of a deed of the 25th of May, 1857, on the goods of the appellants. The respondent was the incumbent of the church of St. Bartholomew, Moorfields; and the appellants were the churchwardens of the parish of St. Giles, Cripplegate.

The church was built and endowed under the provisions of the 2 & 3 Vict. c. 107; by the 86th section of which, the governor and company of the Bank of England were authorized to take down the old church of St. Bartholomew, Exchange, and, in consideration of the site and the materials, to pay a certain sum of money to the Archbishop of Canterbury, and the Bishop of London, which should be employed by them in *780] purchasing a site for and erecting and endowing a church in the city of London, or some parish adjoining thereto. The church was built within the limits of St. Giles, Cripplegate, and the respondent was duly presented to the incumbency thereof.

By an order in council obtained in the year 1850, in pursuance of the provisions of the 59 G. 3, c. 54, s. 16, a particular district was assigned to the said church within the parish of St. Giles, Cripplegate, and called "The District Chapelry of Little Moorfields;" and by the same order in council authority was given to publish banns of marriage, and to solemnize marriages, baptisms, and churchings and burials in the said church; the fees for which were to be paid to the incumbent. From the date of the order in council, marriages, baptisms, and churchings have been solemnized in the said church accordingly.

The deed of the 25th of May, 1857, was an indenture made between the Rev. Philip Parker Gilbert, vicar of the parish of St. Giles, Cripplegate, in the diocese of London, of the first part, the dean and chapter of St. Paul's of the second part, the Bishop of London of the third part, and the respondent of the fourth part,—reciting a local act of 7 G. 4, c. liv., whereby the tithes of the said parish were extinguished, and in lieu thereof an annuity of 1800*l.*, subject to the averages of the price of wheat, was secured to the vicar, payable quarterly. It was then witnessed by the said deed, that, in pursuance of the power given by the 1 & 2 W. 4, c. 45, s. 21, the vicar did thereby annex to the church of the District Chapelry of St. Bartholomew, Moorfields, one-sixth part of the annual sum to which he was entitled as vicar of the parish of Cripplegate under the 7 G. 4, c. liv., to the intent that the respondent and his successors, perpetual curates of the said District Chapelry of St. Bartholomew, Moorfields, should *781] receive the one-sixth part thereby annexed. Two quarters of the respondent's annuity being in arrear, and the churchwardens having on demand refused payment, an

application was made to a justice of the peace at Guildhall, who granted a warrant to levy the said arrears.

The appellants contended before the magistrate, and have argued before us, that the deed of annexation was invalid; and that, even if it were valid, the magistrate could not legally issue a warrant to levy the arrears against the appellants. It was argued that the deed was invalid on two grounds,—first, because the 1 & 2 W. 4, c. 45, s. 21, which authorizes vicars to annex a portion of their tithes, did not empower the vicar to annex the one-sixth part of the annual payment in lieu of tithes secured to him by the local act 7 G. 4, c. liv., recited in the deed,—and, secondly, because, supposing such power to exist, it could not be legally exercised in reference to the church of St. Bartholomew, Moorfields, since the passing of the 19 & 20 Vict. c. 104, as by that act the District Chapelry of St. Bartholomew, Moorfields, had, it was said, become a separate and distinct parish, and, as such, incapable of receiving an annexation of tithes or other revenues under the provisions of the 1 & 2 W. 4, c. 45, s. 21.

On the first point, we are clearly of opinion that the extinguishment of the tithes of St. Giles, Cripplegate, and the substitution of an annual payment by the local act of 7 G. 4, c. liv., did not prevent the legal annexation of a portion of such annual payment by the vicar. It is expressly included by the words of the 21st section of the 1 & 2 W. 4, c. 45, which authorize the annexation of “any part or parts of the tithes or other annual revenues belonging to such rectory or vicarage.” We think, therefore, that the vicar was authorized to annex one-sixth part of the annual payment which he received in lieu of tithes.

*On the second point, it was contended by the appellants' counsel that the power of annexation was applicable only to the church of a district chapelry, and not to the church of a separate and distinct parish; and that, although by the order in council of 1850 (to which no exception was taken), a district was assigned to the church of St. Bartholomew, Moorfields, within the meaning of the 21st section of the 1 & 2 W. 4, c. 45; yet that, as banns of marriage were published, and marriages, churchings, and baptisms were solemnized in it before the passing of the 19 & 20 Vict. c. 104, the District Chapelry of St. Bartholomew, Moorfields, became thenceforth, by the express language of the 14th section, a distinct and separate parish, and so was incapable of receiving any annexation under the provisions of the 1 & 2 W. 4, c. 45, s. 21. [*782]

On the part of the respondent it was answered, that, as there had been a district assigned to the church of St. Bartholomew, Moorfields, within the limits of the parish of St. Giles, Cripplegate, and as, consequently, the respondent was the incumbent of a church of a district chapelry, the 19 & 20 Vict. could not operate to deprive such church of its distinctive character, or to disentitle it to a benefit which up to the time of the passing of that act it might clearly have received.

It is enacted by the 1 & 2 W. 4, c. 45, s. 21, “that it shall be lawful for any rector or vicar for the time being, of any rectory or vicarage, by a deed duly executed by him, to annex to any chapel of ease or parochial chapel, or to any chapel having a district assigned thereto, whether already built or hereafter to be built (such chapel of ease or other chapel or church with the district or place to which the same

belongs, being situate within the limits, or within the original limits, of the said rectory or vicarage) any part or parts of the tithes," &c. It *783] seems quite clear, therefore, that, "after the order in council of 1850, and down to the time of the passing of the act of 19 & 20 Vict. c. 104, an annexation might have been legally made by the vicar of St. Giles, Cripplegate, of part of his annual revenues to the church of St. Bartholomew, Moorfields, to which a district had been assigned, situate within the original limits of the vicarage. The 19 & 20 Vict. c. 104, s. 14, enacted, "that, whensoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms, according to the laws and canons expressed in this realm, are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this act, a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such office without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first-recited act, 6 & 7 Vict. c. 37, and the church or chapel of such district shall be the church of such parish." And by the 15th section of the 6 & 7 Vict. c. 37, such district shall be and be deemed to be a new parish for ecclesiastical purposes, and shall be known as such by the name of the new parish of ———, instead of the district of ———, according to the name so as aforesaid fixed for such district; and such church or chapel shall become and be the church of such new parish accordingly." We think that the district chapelry of St. Bartholomew, Moorfields, falls within the provisions of the 19 & 20 Vict. c. 104, s. 14, and has become since the passing of that act a separate and distinct parish for ecclesiastical purposes. But *784] we do not find anything in that act indicating the "intention of the legislature to alter the nature and character of district churches, otherwise than for ecclesiastical purposes.

The church of St. Bartholomew, Moorfields, is still a church to which a district has been assigned, locally situate within the limits of St. Giles, Cripplegate, and is therefore capable of receiving the annexation made under the provisions of 1 & 2 W. 4, c. 45, s. 21. Although for ecclesiastical purposes it has become a new parish, it remains a district chapelry for all other purposes.

We think, therefore, that the deed of annexation is a good and valid deed.

The next point made by the appellants, was, that, assuming the validity of the deed, the warrant to levy the arrears due to the respondent could not legally be granted by the magistrate. The respondent grounds his right to this warrant upon the 21st section of the 1 & 2 W. 4, c. 45, in connection with the local act of 7 G. 4, c. liv.

The 21st section of the 1 & 2 W. 4, c. 45, enacts "that the incumbent for the time being" (of the district church) "shall have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed" (including the case of the annexation of a part of the vicar's annual revenues) "as the rector or vicar for the time being of the rectory or vicarage might have had, if such annexation had not been made." And by the 3d section of the 7 G. 4, c. liv., it is enacted,

"that, in case any quarterly payment of the annual sum of 1800*l.*, or any part thereof, shall be in arrear and unpaid for twenty-eight days, it shall be lawful for one of Her Majesty's justices of the peace of the city of London, on complaint of the vicar, to summon the churchwardens and any one or more inhabitants of the parish to the number of thirty, *to be nominated by the vicar, to appear before him and pay the [785 arrears: and if, on appearing, they do not prove payment of the arrears, to grant a warrant to levy them of the goods and chattels of the parties summoned, and appearing." And it is further provided that the like proceedings may be resorted to if the whole of the arrears and the expenses are not levied on the first occasion; and so from time to time until the whole be paid.

On the part of the appellants, it was argued that this section was of a very harsh and stringent character, and did not apply to a case, where the vicar had parted with a portion of the annual sum granted to him. But, as the vicar by this section has power to obtain a warrant "where any quarterly payment, or any part thereof, shall be in arrear;" and as by this statute 1 & 2 W. 4, c. 45, s. 21, the grantee in all cases of annexation has the same powers and remedies as the vicar himself would have had before annexation, we think that the warrant was rightly granted in this case.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed accordingly.

*GREENOUGH *v.* JOSEPH ECCLES, ALEXANDER ECCLES, and EDWARD ECCLES. *Feb.* 12. [786

A witness whose testimony turns out to be unfavourable to the party calling him is not therefore an "adverse" witness within the meaning of the 22d section of the Common Law Procedure Act, 1854.

To make him an "adverse witness," so as to entitle the party calling him to contradict him by other evidence showing that he has made at other times a statement inconsistent with his present testimony, he must in the opinion of the presiding judge be adverse in the sense of showing a hostile mind.

Semble, that, whether adverse or not, is for the judge and not for the court to determine.

THIS was an action by endorsees against the drawers of two bills of exchange. The first count was upon a bill for 860*l.* drawn by the defendants on the 27th of April, 1857, upon, and accepted by, Messrs. Eastham, Brothers, payable three months after date, and endorsed by the defendants to one John Cadman, and by Cadman to the plaintiff. The second was upon a bill for 280*l.* drawn by the defendants on the 28th of March, 1857, upon, and accepted by, John Cadman, payable four months after date, and endorsed by the defendants to the plaintiff. There was also a count upon an account stated.

The defendant Joseph Eccles pleaded to the first count, except as to 305*l.* 17*s.* 6*d.*, parcel of the money therein claimed, that the defendants endorsed the said bill of exchange in the first count mentioned to the said John Cadman to enable the said John Cadman to get the said bill discounted or to raise money upon the said bill for them the defendants, and that there was no consideration for the endorsement of the said bill

to the said John Cadman; and that the said John Cadman applied to the plaintiff to discount the said bill, and that the plaintiff refused to discount the said bill, but agreed to advance to the said John Cadman the sum of 300*l.* upon the security of the said bill, and upon the terms, that, on the repayment of the said sum of 300*l.* and interest thereon, he the plaintiff would give up the said bill: that the plaintiff did afterwards advance to the said John Cadman the said sum of 300*l.*, and the said John Cadman endorsed the said bill to the plaintiff on the terms aforesaid; and that, save as aforesaid, there was no consideration for the *787] endorsement of the said bill by the said John Cadman *to the plaintiff; and that the sum of 305*l.* 17*s.* 6*d.* was the whole sum which had ever become due to the plaintiff in respect of the said sum of 300*l.* and interest thereon, or in respect of the said bill.

For a further plea, as to so much of the first count as related to the said sum of 305*l.* 17*s.* 6*d.*, he pleaded payment into court: and to the second count, he pleaded that the bill in that count mentioned was not duly presented for payment, and that the defendants had not due notice of dishonour: and, to the last count, never indebted.

The other two defendants pleaded,—first, as to the first count, except as to the sum of 305*l.* 17*s.* 6*d.*, parcel of the money therein claimed, that the defendants, at the time of the drawing and endorsing of the said bill of exchange carried on business in partnership under the firm of Joseph Eccles & Co., and that the said Joseph Eccles endorsed the said bill to the said John Cadman in the name of the said firm of Joseph Eccles & Co., to enable the said John Cadman to get the said bill discounted, or to raise money upon the said bill, for the benefit of him the said Joseph Eccles, and that there was no consideration for the endorsement of the said bill to the said John Cadman; and that the said John Cadman applied to the plaintiff to discount the said bill, and that the plaintiff refused to discount the said bill, but agreed to advance to the said John Cadman the sum of 300*l.* upon the security of the said bill, and upon the terms that, on the repayment of the said sum of 300*l.* and interest thereon, he the plaintiff would give up the said bill: that the plaintiff did afterwards advance to the said John Cadman the said sum of 300*l.*, and the said John Cadman paid the said sum of 300*l.* to the said Joseph Eccles, and the said John Cadman endorsed the said bill to the plaintiff on the terms aforesaid; and that, save as aforesaid, *788] there was no consideration for the endorsement of the said *bill by the said John Cadman to the plaintiff: and that the sum of 305*l.* 17*s.* 6*d.* was the whole sum which had ever become due to the plaintiff in respect of the said sum of 300*l.* and interest thereon, or in respect of the said bill.

Secondly, to the first count, except as to the said sum of 305*l.* 17*s.* 6*d.*, that the defendants, at the time of the drawing and endorsing of the said bill of exchange in the first count mentioned, carried on business in partnership as cotton-brokers, under the firm of Joseph Eccles & Co., and that the said Joseph Eccles drew the said bill and endorsed the said bill to the said John Cadman in the name of the said firm of Joseph Eccles & Co., and for his own purposes only, and not for the purposes of the said firm of Joseph Eccles & Co., and in fraud of the said Alexander Eccles and Edward Eccles; and the said John Cadman, at the time the said bill was endorsed to him, had notice of all the facts in that

plea above mentioned: that the said John Cadman applied to the plaintiff to discount the said bill, &c., as in the first plea.

Thirdly, as to so much of the first count as related to the sum of 30*5*l. 17*s*. 6*d*., payment of that sum into court,—fourthly, fifthly, and sixthly, to the second count, that the defendants did not endorse the bill therein mentioned, that it was not duly presented for payment, and that the defendants had no notice of dishonour,—seventhly, to the last count, never indebted.

The plaintiff joined and took issue on all the pleas except those of payment into court, and as to those took out the money in satisfaction *pro tanto*.

The cause was tried before Cockburn, C. J., at the sittings in Middlesex after Michaelmas Term, 1857. The evidence on the part of the plaintiff was to this effect:—Cadman, to whom the bill mentioned in the first count had been endorsed and delivered by Joseph Eccles, applied to the plaintiff to discount it. The *plaintiff at first objected [*789 to discount a bill for more than 300*l*., but ultimately consented to advance Cadman 300*l*. upon the bill, on Cadman agreeing that the residue should go in part liquidation of a debt due from him to the plaintiff.

The case on the part of the defendants Alexander and Edward Eccles, was, that the agreement with Cadman was, that the bill should be restored to him by the plaintiff upon the repayment of the 300*l*. advanced, with interest. To prove this, they called Cadman; but the account he gave of the transaction was substantially the same as that which the plaintiff had previously given. Cadman was then asked by the defendants' counsel whether he had not told one Bardwell that he had only authorized the plaintiff to retain the bill as a security for the 300*l*. advanced by him, and interest. This was objected to by the plaintiff's counsel; whereupon the defendants' counsel proposed, under the authority of the 22*d* section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, (a) to give evidence, oral as well as written, (b) of former statements made by the witness at variance with the evidence he had just given.

The learned judge was of opinion that the word **"adverse"* [*790 in the statute was to be understood as meaning "hostile," and not merely "unfavourable;" and being of opinion, that the witness had not proved adverse in the sense of showing a mind hostile to the party calling him, he declined to receive the evidence.

A verdict having been found for the plaintiff for 569*l*. 6*s*. 8*d*. in addition to the money paid into court,

Hugh Hill, Q. C., in Hilary Term, 1858, moved for a new trial on the ground that the proposed evidence was improperly rejected. The ruling of the learned judge was in substance this,—that the word *"adverse"* in the statute was meant to apply, not to the testimony, but to the witness himself. See what was the evil the statute intended to

(a) Which enacts that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony: but, before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

(b) The witness had made the affidavit upon which the defendants had been let in to defend under the Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67.

remedy. In *Ewer v. Ambrose*, 3 B. & C. 746 (E. C. L. R. vol. 10), 5 D. & R. 629 (E. C. L. R. vol. 16), to assumpsit for money had and received, the defendant pleaded that the promises in the declaration mentioned were made by him jointly with A. B. At the trial A. B. was called as a witness by the defendant to prove a partnership, *but he proved the contrary*; the defendant then tendered in evidence an answer of A. B. to a bill in Chancery, in which A. B. had sworn that up to a certain time he was a partner with the defendant: the court inclined to think that the answer was not admissible in evidence, because the only effect of it was to discredit the defendant's own witness. Bayley, J., said: "It was competent to the plaintiff in cross-examination to have asked the witness if he had sworn, in his answer in Chancery, contrary to the fact he was then deposing to; and, if he had said that he had not, then the plaintiff, in order to discredit him, might have given the answer in evidence; but he could not do so without putting the preliminary question to him. But I think the defendant ought not to have been permitted so to discredit his own witness." And Holroyd, *791] J., said: "I take the rule of law to be, that if a witness proves a case against the party calling him, the latter may show the truth by other witnesses. But it is undoubtedly true, that, if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to show that that witness is not to be believed on his oath, but he may show by other evidence that he is mistaken as to the fact which he is called to prove." So, in *Wright v. Beckett*, 1 M. & Rob. 414, it was held by Lord Denman, C. J., that, where a witness gives evidence destructive of the case which he was called to prove, the party calling him might, in order to neutralize his evidence, show that he had before the trial given to the attorney an account of the transaction entirely different from that sworn to by him at the trial: and his Lordship afterwards, upon a motion for a new trial, sustained his ruling by a very elaborate judgment, in which all the authorities are reviewed. Bolland, B., however, entertained an adverse opinion. In *Holdsworth v. The Mayor of Dartmouth*, 2 M. & Rob. 153, it was ruled by Parke, B., that where a witness gives on cross-examination testimony unfavourable to the party calling him, and on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him by showing he *had* given such different account. "I never," said the learned Baron, "had any doubt but that the opinion of my Brother Bolland was right in the case cited, if the fact were asked to in the examination in chief; as, by calling the witness, you take him for better and for worse, and must not throw discredit on him. I am now satisfied that it makes no difference that the fact is elicited on cross-examination. The effect and object of the evidence is, to discredit the witness. It goes to his general credit to show *792] that he *has* given a different account of the matter before; and it is a clear rule, that a party has no right to put a witness into the box as a witness of credit, and, when he gives unfavourable evidence to call testimony to discredit him." In *Melhuish v. Collier*, 15 Q. B. 878 (E. C. L. R. vol. 69), the rule is thus stated,—Although the general rule is, that on the trial of a cause, a party shall not discredit his own witness, yet, if the witness unexpectedly gives adverse evidence, the party *may* ask him if he has not on a particular occasion made a contrary state-

ment; and the question and answer may be stated by the judge to the jury with the rest of the evidence; the judge cautioning them not to infer merely from the question that the fact suggested by it is true. But, whether, in such case, the party may contradict the witness by evidence as to such former statement,—*quære*. This was the doubt which the statute intended to set at rest. [WILLIAMS, J.—The statute seems to assume that the witness could not be contradicted as to the particular fact by other testimony. COCKBURN, C. J.—There was a clear case against you upon the plaintiff's evidence. You called a single witness. His testimony turned out to be adverse to you. Having no other witness to call, what could you gain by neutralizing his evidence?] We might have gone to the jury upon the plaintiff's testimony, and asked the jury to disbelieve him.

A rule nisi having been granted,

Parry, Serjt., and Doyle, in Trinity Term last, showed cause.—The statute expressly leaves it to the judge at the trial in his discretion to allow the party to contradict his own witness, if in his opinion he proves adverse. The Lord Chief Justice in this case having exercised his discretion by declining to allow the contradiction, his decision upon the matter is final. *In *Clarke v. Saffery, R. & M.* 126 (E. C. L. [*793 R. vol. 21), on the trial of an issue from the Court of Chancery, with power to the plaintiff to examine the defendant as a witness, Best, C. J., ruled that the plaintiff's counsel might, as matter of right, cross-examine the defendant, although called as his witness; the defendant standing in a situation necessarily adverse,—saying: "There is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination: but, if a witness called stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may as matter of right cross-examine him." And in *Bastin v. Carew, R. & M.* 127 (E. C. L. R. vol. 21), where a similar objection was taken, Abbott, C. J., said: "I mean to decide this, and no further, that, in each particular case, there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice." The discretion of the judge in this respect, like the refusal of amendment under the statutes relating to amendments, is not the subject of review. [COCKBURN, C. J.—I did not profess to decide the matter at the trial. I expressed a desire that the opinion of the court should be taken upon it; though I certainly should have received the evidence if I had thought the word "adverse" ought to be understood as meaning "unfavourable."] The proposed evidence was, upon the true construction of the 22d section, properly rejected. The section provides that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove *adverse*, contradict him by other evidence, or, by leave *of the judge, prove that he has made at other [*794 times a statement inconsistent with his present testimony." The word *adverse* controls both the latter branches of the section. The legislature evidently intended that the witness himself, and not his evidence merely, should be adverse, in the sense of being the emanation of

a hostile mind. Before the passing of the act, a party could not have called another witness merely to contradict one who had been previously called by him: *Melhuish v. Collier*, 15 Q. B. 878 (E. C. L. R. vol. 69). This power is entirely new: and it is reasonable to suppose that the legislature intended it to be controlled by the discretion of the judge, who sees the witness before him. Many inconveniences might be suggested if this were left to the discretion of the parties themselves. It might be giving greater effect to unsworn testimony than to evidence given under the sanction and safeguard of an oath. [COCKBURN, C. J.—A literal construction of the words of the section would be carrying the law back from what it was in *Melhuish v. Collier*. If the section is to be considered as declaratory only of what the law was before, the word “adverse” must be read as meaning “adverse testimony.” The latter branch of the section, however, clearly is not declaratory. WILLIAMS, J.—There is evidently some blunder in the section. In all probability it was intended to be read thus,—“but he may contradict him by other evidence, or, in case the witness shall, in the opinion of the judge, prove adverse, by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony.”] All the cases speak of an adverse mind of the witness. The legislature seem to have followed out that view. If they had meant “adverse testimony,” they would have said so; and there would have been nothing for the judge *795] to exercise a discretion upon. [COCKBURN, C. J.—Testimony *adverse to the party calling the witness might be extracted from the witness reluctantly.] In *Melhuish v. Collier*, Erle, J., says: “There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then, for a bribe, or from some other motive, make statements in support of the opposite interest. In such cases, the law undoubtedly ought to permit the party calling the witness to question him as to the former statement, and ascertain if possible what induces him to change it.” In *Roscoe on Evidence*, 9th ed. 152, speaking of this statute it is said: “It will be seen that leave of the judge is made a condition precedent to the proof of former inconsistent statements, and also premonition and pre-examination as to such statements. In one particular, the act seems to limit the former admitted liberty of calling witnesses to contradict another witness called by the same party; for, in such cases, it has been the practice for counsel to consult only their own judgment in calling other witnesses to prove all relevant facts, although their testimony may incidentally contradict the testimony of one already called on the same side.” Assuming that the Lord Chief Justice was wrong in declining to receive the proposed evidence, still there is no ground for a new trial. The utmost effect of its reception would have been to neutralize the testimony of Cadman; and then the plaintiff’s evidence would stand, as it now does, uncontradicted.

Mellish and Manisty, Q. C., in support of the rule.—It may be that the words “by leave of the judge” may give the presiding judge a discretion to reject evidence in contradiction of a witness who has proved adverse: but here the Lord Chief Justice rejected the evidence because he was of opinion that the witness had not proved adverse. The *796] preliminary question must *always be for the judge,—as, where a lunatic or a child of tender years is offered as a witness. But, upon a preliminary question of this sort, the court will always review

the judge's discretion where has mistaken the principle: *Closmadeuc v. Carrel*, 18 C. B. 36 (E. C. L. R. vol. 86). The question is, what did the legislature mean when speaking of a witness who shall prove adverse,—did they mean that the witness shall prove hostile to the party calling him, or that the testimony he gives shall be adverse? The word “adverse,” as applied to a person, is more properly applicable to his acts and conduct; as, in common parlance, we say an adverse counsel, or an adverse general. It is enough if the word is susceptible of that meaning. In order to understand correctly what the legislature did mean, it is necessary to look at the state of the law upon this subject at the time the statute passed. There were two questions upon which there had been very considerable difference of opinion,—the first, whether a party could ask his own witness whether he had not upon another occasion given a different account of the transaction from that which he then deposed to,—the other, whether, if the witness denied having done so, the party calling him was at liberty to call other witnesses to prove that he had done so. But the foundation of both was, that the witness had given adverse testimony. A witness is called from the enemy's camp: he shuffles; and nothing can be got out of him. There, no adverse testimony being given, the statute does not apply. The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition. If he has not given adverse or hostile evidence, you do not want to contradict him. In the judgments of Lord Denman and Bolland, B., in *Wright v. Beckett*, 1 M. & Rob. 414, no reference is made to the personal hostility of the witness. In *Ewer v. Ambrose*, 3 B. & C. 746 (E. C. L. R. vol. 10), *5 D. & R. 629 (E. C. L. R. vol. 16), Bayley, J., says: “I have no doubt, that, if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty afterwards to make out his own case by other witnesses.” [COCKBURN, C. J.—That was long ago settled.] It evidently did not occur to the mind of any person concerned in the drawing or in the passing of the statute that anything would turn on the hostile disposition of the witness. The doubts upon this subject were very elaborately-discussed in the 8th edition of Phillpotts on Evidence, p. 901. “It is proposed,” says the learned author, “now to inquire whether a party can be allowed to discredit his own witness, that is, produce evidence which may have the effect of throwing discredit upon him. It is clear a party is not to be sacrificed to his witness: he is not represented by him, nor to be identified with him: nor ought he to be bound by all that the witness may say. On the other hand, a party ought to be placed under such restrictions as may be necessary for preventing unfair or dishonest practice. If a party produces a witness, knowing him at the time to be a man of infamous character, and the witness, in giving evidence, disappoints or deceives him, shall the party be allowed to prove his infamy, for the purpose of destroying the effect of his evidence? If a party, not acting himself a dishonest part, is deceived by his witness, or if a witness, professing himself a friend, turns out an enemy, and, having promised proof of one kind, gives evidence directly contrary,—is the party to be restrained from laying the true state of the case before the court? If a witness, whether from mistake, from ignorance, or from design, gives evidence unfavourable to the party who calls him, is the party to be restrained from calling other

witnesses to prove facts different from those represented by the former witness? These are some of the questions which will *occur to *798] the reader, on the first view of the subject, and which one might think it would not be difficult to answer. In the first place, it is laid down, a party will not be permitted to discredit his own witness by general evidence. The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character as would render him unworthy of credit." That shows that the first part of the section in question is only an affirmation of what the law was before. The learned author proceeds,—"'This,' says Mr. Justice Buller (Bul. N. P. 297), 'would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.' But it is now clearly settled that a party may prove by other evidence the truth as to a material fact relevant to the issue in a cause, though it may collaterally have the effect of discrediting his own witness. If witnesses had been called before the *adverse witness*, their evidence must have been received without objection; and it cannot make any real difference in the case, that a witness giving *adverse testimony* has been called first. The rule is equally applicable, whether a witness is forced upon a party by law (as in the case of a subscribing witness to a deed), or is voluntarily selected to give evidence." There, the terms "*adverse witness*" and "*adverse testimony*" are used as synonymous. And, after referring to some authorities, he says: "Whether it be competent to a party to prove that a witness who has been called by him, and who has given unfavourable evidence, has been heard at other times to make a statement contrary to that made in court, is a question on which there exists a difference of opinion.(a) On the one side, it is urged, such *evidence would be open to the objection that the party would *799] thus discredit his own witness by general evidence; that this rule ought to be universal; and that, to allow the evidence of a witness to be disproved and contradicted by other witnesses (which seems at first sight an exception to the rule), is in truth no exception, but an accidental consequence attendant upon giving evidence relevant to the issue: and the reason given for such practice shows this to be the correct view. 'Such facts,' says Mr. Justice Buller, 'are evidence in the cause; and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.' It is further urged that there is some danger of collusion and dishonest contrivance inasmuch as a witness may be induced to make a statement out of court, for the very purpose of its being reserved and afterwards used in contradiction to the witness, and that the jury may regard such a statement as substantive evidence in the cause. On the other side, it may be argued, the evidence is not open to the objection that the party would thus discredit his own witness by general testimony; that, although a party who calls a person of bad character as a witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavourable to him, by direct proof of general bad character,—yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by

(a) Referring to the judgments of Lord Denman, C. J., and Bolland, B., in *Wright v. Beckett*, 1 M. & Rob. 414.

surprise, and is contrary to the examination of the witness preparatory to the trial; that this course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence (being really in the interest of the opposite party), and afterwards, by hostile evidence, ruin his cause; that the rule, with the above exception, as to offering *contradictory evidence, ought to be the same whether the witness is called by the one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony is the same in both cases; that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked that this is a question in which not only the interests of litigating parties are involved, but also the more important general interest of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that, in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences." This, and the case of *Melhuish v. Collier*, 15 Q. B. 878 (E. C. L. R. vol. 69), shows what was the mischief the statute was designed to remedy,—a mischief more applicable to adverse testimony, than to a hostile or malevolent feeling on the part of the witness. This is the principle upon which a similar clause in the Scotch Evidence Act of a former session,—15 & 16 Vict. c. 27, s. 3,—was framed. That section enacts that "it shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent, in the course of such action or proceeding, to adduce evidence to prove that such witness has made such different statement on the occasion specified." [COCKBURN, C. J.—The reference to the opinion of the judge would seem to show that the legislature could not have been dealing with the mere question of adverse testimony. The opinion of the judge would not be needed for that.] It may often *be a question of considerable nicety whether evidence is adverse or not, in the sense of being detrimental. To constitute adverse testimony, it must be positive testimony opposed to the interest of the party. As to the objection, that, Cadman's evidence being withdrawn, nothing was left to impeach the evidence given by the plaintiff,—it is to be observed that the admitted circumstances under which the bill was drawn might have induced the jury to have disbelieved the plaintiff's testimony if it had stood uncorroborated. [COCKBURN, C. J.—There was nothing to affect the plaintiff's evidence but the contradiction of Cadman. If that had been received, I must have told the jury, that, striking out Cadman's evidence, the plaintiff's case was unanswered.] The real test is, whether the Lord Chief Justice could have directed the jury to find for the plaintiff. *Cur. adv. vult.*

WILLIAMS, J.—The question in this case is, whether, in construing the terms of the 22d section of the Common Law Procedure Act, 1854, "in case the witness shall prove adverse," the word "adverse," ought to be understood as meaning merely "unfavourable" or as meaning "hostile." The Lord Chief Justice at the trial thought the word ought

to be understood as meaning "hostile;" and, being of opinion that the witness had not proved so, refused to allow evidence to be given that he had at another time made a statement inconsistent with his testimony in the witness-box. But my Lord informed us that he certainly should have received such evidence, if he had thought the word "adverse" ought to be understood as meaning merely "unfavourable:" and, if it might be so understood, the verdict may perhaps be considered, under the *802] circumstances, so unsatisfactory as to make it right *to order a new trial. But, after much consideration, I am of opinion that my Lord's construction was right, and therefore that this rule must be discharged.

The section lays down three rules as to the power of a party to discredit his own witness,—first, he shall not be allowed to impeach his credit by general evidence of his bad character,—secondly, he may contradict him by other evidence,—thirdly, he may prove that he has made at other times a statement inconsistent with his present testimony.

These three rules appear to include the principal questions that have ever arisen on the subject; as may be seen by referring to the chapter in *Phillipps on Evidence* which treats "of the right of a party to disprove or impeach the evidence of his own witness." And it will there be further seen that the law relating to the first two of these rules was settled before the passing of the act, while, as to the third, the authorities were conflicting: that is to say, the law was clear that you could not discredit your own witness by general evidence of bad character, but you might nevertheless contradict him by other evidence relevant to the issue. Whether you could discredit him by proving that he had made inconsistent statements, was to some extent an unsettled point.

In favour of construing the word "adverse" to mean merely "unfavourable," the main arguments are, that, taking the words of the section in their natural and ordinary sense, its object appears to be to declare the whole law on the subject by negating the right as to the first, and affirming it both on the second and third points; but that it proceeds to fetter the right as to both the latter; for, the right is declared to exist in the former as well as the latter of these two instances, "in case the witness shall, in the opinion of the judge, prove adverse,"—*803] with the additional qualification, as to *the latter, that the leave of the judge must be obtained. The right, it is argued, according to this enactment, is not to exist in either instance, if the judge is not of that opinion. The fetter thus imposed, it is further said, would be harmless in its operation, if "adverse" be construed "unfavourable," but most oppressive if it means "hostile;" because the party producing the witness would be fixed with his evidence, when it proved pernicious, in case the judge did not think the witness "hostile," which might often happen; whereas, he could not in such a case fail to think him "unfavourable."

The court, then, it is argued, ought to prefer the more lenient construction, which does not at all conflict with the sense in which the word "adverse" has been often applied in speaking of an adverse witness, and is, moreover, in accordance with the principle on which the legislature proceeded in the enactment of the Scotch act, 15 & 16 Vict. c. 27, s. 3, whereby an absolute unqualified power is given to examine

any witness as to whether he has made a statement different from his evidence.

But there are two considerations which have influenced my mind to disregard these arguments. The one is, that it is impossible to suppose the legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue,—a right not only fully established by authority, but founded on the plainest good sense. The other is, that the section requires the judge to form an opinion that the witness is adverse, before the right to contradict, or prove that he has made inconsistent statements, is to be allowed to operate. This is reasonable, and indeed necessary, if the word “adverse” means “hostile,” but wholly *unreasonable and unnecessary if it means “unfavourable.”

On these grounds, I think the preferable construction is, that, [*804 in case the witness shall, in the opinion of the judge, prove “hostile,” the party producing him may not only contradict him by other witnesses, as he might heretofore have done, and may still do, if the witness is unfavourable, but may also, by leave of the judge, prove that he has made inconsistent statements.

With respect to the Scotch act, it is plain that the legislature did not think proper, in passing the Common Law Procedure Act, to act on the same principle. The right to show that the witness has made inconsistent statements is not conferred absolutely, as it is in the former statute.

Whatever is the meaning of the word “adverse,” the mere fact of the witness being in that predicament is not to confer the right of discrediting him in this way. The section obviously contemplates that there may be cases where the judge may properly refuse leave to exercise the right, though in his opinion the witness prove “adverse.” And, as the judge’s discretion must be principally, if not wholly, guided by the witness’s behaviour and language in the witness-box (for, the judge can know nothing, judicially, of his earlier conduct), it is not improbable that the legislature had in view the ordinary case of a judge giving leave to a party producing a witness who proves hostile, to treat him as if he had been produced by the opposite party, so far as to put to him leading and pressing questions; and that the purpose of the section is, to go a step further in this direction, by giving the judge power to allow such a witness to be discredited, by proving his former inconsistent statements, as if he were a witness on the other side.

*WILLES, J.—I entirely agree with the judgment which has just been pronounced by my Brother Williams. I will only add [*805 a few words. If “adverse,” in the 22d section of the Common Law Procedure Act, 1854, means “hostile,” the Lord Chief Justice was right: if it means only “who gives evidence opposed to the interest of the party who calls him,” then the Lord Chief Justice was wrong. I am of opinion that he was right.

The legislature never could have intended to introduce the unsworn statements of a witness as evidence in favour of a party who calls him,—which with the jury they inevitably would be,—merely on the ground that the witness, without any sinister motive or ill feeling, honestly gives a different account of the matter in the witness-box from what he had given on a former occasion, without fraud upon the party who calls

him. It would be unjust to the party, and oppressive and unfair to the witness, to allow this.

Such an extension of the category of admissible hearsay evidence, if intended, would have been more clearly expressed.

The interposition of the opinion of the judge would have been idle, if "adverse" meant merely "giving unfavourable evidence."

The argument founded on the provision for admitting other evidence to contradict the adverse witness, is unfounded; because the section professes to provide for a peculiar class of cases, in which it enacts that a particular course may be taken which could not have been taken before, in addition to that which might have been taken before in a more extensive class of cases, including that specially provided for: and the introduction into such a section of a provision superfluous or over-cautious, because applicable in the more extensive class in which the common law makes the same provision, does not repeal the common *806] law in *cases within that more extensive class which do not fall within the peculiar class to which the enactment exclusively refers. No mischief, therefore, will follow from the construction I put upon the section, by in any case excluding evidence which was admissible before the act.

Moreover, even if the Lord Chief Justice had been wrong, I should have been, as at present advised, of opinion that we have no jurisdiction to review that ruling. In order, no doubt, to prevent the increase of causes of new trial, the legislature have, as it appears to me, in terms made the opinion of the judge upon this point absolute, and therefore final.

COCKBURN, C. J.—I think it necessary to add a word. This case was argued before my two learned Brothers who have delivered their opinions, and myself. At the trial, I took the view which has been sanctioned by their acquiescence: but the discussion which the matter has undergone has excited in my mind doubts of a very grave character, which, however, it is unnecessary to do more than allude to, inasmuch as my learned Brothers constitute the majority of the court. I must, therefore, be taken rather as not dissenting from this decision, than as assenting to it. Looking at the 22d section of the Common Law Procedure Act, 1854, I think it is clear that there has been a great blunder in the drawing of it, and on the part of those who adopted it. The first two branches of the section were evidently intended to be declaratory of the existing law, but the third branch goes far beyond it. It was intended to give a party producing a witness an opportunity, with the leave of the judge, if the witness should prove adverse,—which, I agree with my learned Brothers, must, in this part of the section, be understood to mean "hostile,"—of showing that he had previously *807] *made a statement contradictory to his then testimony. But unfortunately, the word "adverse," instead of preceding the third branch of the section only, is made to precede the second branch, which is clearly declaratory of the existing law; so that, if the word "adverse" in the second branch of the section is to receive the same interpretation which it is now considered it ought in the third branch to bear, there would be imposed an additional restriction to that which existed before the statute, upon the right of the party calling the witness to show by other evidence facts which the witness had contradicted. If, therefore,

it were necessary to put an interpretation upon the word "adverse," with reference to the second branch of the section, I should incline to think it impossible that the legislature could have intended to use that word in a sense which would impose a restriction which did not before exist. However, perhaps the better course is, to consider the second branch of the section as altogether superfluous and useless. The whole section is so confused, and it is so difficult to make any sense of it, that my mind is not satisfied so far as to induce me to assent to the judgment of the court. Without, therefore, actually dissenting from it, it is enough to say that I do not wholly concur in it.

Rule discharged.(a)

(a) See *Dear v. Knight*, 1 Foster & F. N. C. P. 433.

A party is not entitled to discredit a witness called by him, whose testimony proves adverse to his case, by general evidence: 3 Phillips on Evidence, by Cowen & Hill, 779; 1 Greenl. 442; *Stockton v. Demuth*, 7 Watts 39; *Smith v. Price*, 8 Watts 447; *Bank of Kentucky v. Shier*, 4 Rich. 233; *Commonwealth v. Starkweather*, 10 Cush. 59; *Chamberlain v. Sands*, 27 Maine 458; but he may disprove, by other evidence, the facts stated by the witness: *Cowden v. Reynolds*, 12 Serg. & R. 281; *Jackson v. Leech*, 12 Wend. 39; *Swanescot Machine Co. v. Walker*, 2 Foster 457; *Burkhalter v. Edwards*, 16 Geo. 573; *Hall v. Houghton*, 37 Maine 411; *Seary v. Dearborn*, 19 N. H. 351; *Brown v. Wood*, 19 Missouri 475; *Upton v. Rauer*, 29 Alab. 188; *Parsons v. Suydam*, 3 E. D. Smith 276; *Brown v. Osgood*, 25 Maine 505; *Shelton v. Hampton*, 6 Ired. 216; *Wolfe v. Hauver*, 1 Gill 84; *Thompson v. Blanchard*, 4 Comst. 303; *Hice v. Cox*, 12 Iredell 315.

Whether the party may, under such circumstances, give evidence of previous and inconsistent declarations of the witness, has been much disputed in the United States as well as in England. It is generally held that

he cannot: *Stockton v. Demuth*, 7 Watts 39; *Smith v. Price*, 8 Watts 447; *Hunt v. Fish*, 4 Barb. 571; *Chamberlain v. Sands*, 27 Maine 458; *Commonwealth v. Starkweather*, 10 Cush. 59; *Commonwealth v. Welsh*, 4 Gray 536; *Paxton v. Boyce*, 1 Texas 317. Yet, where the witness is one called of necessity, as the subscribing witness to a will or the like, or, being in the interest of the adverse party, has imposed himself on the party calling him by a trick, or has been tampered with in any way, such evidence is admissible according to some of the authorities in the discretion of the court: *Cowden v. Reynolds*, 12 Serg. & R. 281; *Bank of N. L. v. Davis*, 6 Watts & Serg. 285; *Brown v. Bel-lows*, 4 Pick. 179; *Dennett v. Dow*, 17 Maine 19; See *Commonwealth v. Starkweather*, 10 Cush. 59; 1 Greenl. Evid. 442; *Starkie*, by Sharswood, 244.

These rules have been applied in New York to the examination of a party to the suit by his adversary: *Pickard v. Collins*, 23 Barbour 444; *Holbrook v. Mix*, 1 E. D. Smith 154; but see in Arkansas, under the statute in that state, *Drennan v. Lindsay*, 15 Ark. 361.

***808] *THE MARQUIS OF CAMDEN *v.* BATTERBURY. Feb. 5.**

By articles of agreement under seal, the plaintiff covenanted with one E. that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereafter agreed and covenanted to be built by him upon the land thereafter described and agreed to be demised, &c., by indenture demise and lease unto E., his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th of September then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one-sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of a peppercorn only. The articles then contained a covenant by E. with the plaintiff to pay the rent thereinbefore agreed to be reserved, and to pay rates, &c., to erect the messuages; and also a covenant, that, until the land, and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E., his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff in case the whole or any part of the said yearly rent or rents thereby or by the said leases so to be granted as aforesaid to be reserved, should be behind or unpaid for twenty-one days.

In January, 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W. :—

Held, that neither E. nor the defendant acquired any estate in the premises under the building agreement; nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums.

THIS was an action for use and occupation, and for money found due upon accounts stated. Plea, never indebted.

The cause was tried before Willes, J., at the last Summer Assizes for Surrey. The action was brought to recover 241*l.* for one year's rent from Lady-Day, 1857, to Lady-Day, 1858, of certain ground and premises at Camden Town, St. Pancras, under the following circumstances :—

By an indenture under seal, bearing date the 4th of February, 1853, being certain building articles between the plaintiff of the first part, the Rev. Thomas Randolph, prebendary of the prebend of Cantlowes, in the Cathedral Church of St. Paul's, London, of the second part, and one John Watts Elliott, therein described, of the third part, it was witnessed as follows :—“ In pursuance of an act of parliament passed in the 53 G.

***809]** 3, intituled ‘An Act for enabling the prebendary of Cantlowes, in the Cathedral Church of St. Paul's, London, to grant a lease with powers of renewal of the prebendal lands in Kentish Town, in the county of Middlesex,’ and in consideration of the expense which the said J. W. Elliott, his executors, &c., will be at in erecting the messuages, tenements, and buildings hereinafter covenanted to be erected and built upon the ground hereinafter described and agreed to be demised, and also in consideration of the yearly rents, covenants, and agreements hereinafter reserved and contained on the part of the said J. W. Elliott, his executors, &c., he the said George Charles Marquis Camden, with the privy and approbation of the said Thomas Randolph, testified, &c., doth hereby, for himself, his heirs, &c., covenant and agree with the said J. W. Elliott, his executors, &c., that he the said Marquis, his executors,

&c., shall and will, at the costs and charges of the said J. W. Elliott, his executors, &c., from time to time, when and so soon as the said J. W. Elliott, his executors, &c., shall have erected and covered in one or more of the messuages or tenements hereafter agreed and covenanted to be built by him, upon the piece or parcel of ground hereinafter described and agreed to be demised, and laid the gutters with lead or iron, and fixed up iron pipes to carry off the water, and made the areas and the fence and garden walls, nine inches in thickness at the least, to divide and separate each house and the ground to be thereto allotted for yards or gardens from the premises adjoining on each side, by indenture or indentures of lease, demise and lease unto the said J. W. Elliott, his executors, administrators, nominees, or assigns, the whole or such part or parts whereon one or more of the said messuages or tenements shall be built or covered in, and such other things thereon done as aforesaid, of all *that piece or parcel of ground situate, lying, and being, [810 &c., together with the several brick messuages or tenements and buildings which shall be erected and built on the pieces or parcels of ground hereinbefore described and hereby agreed to be demised, pursuant to the covenants for that purpose hereinafter contained (except and always reserved unto the said Marquis Camden, his executors, &c., and his and their tenants of the adjoining property, the free passage and running of water and soil through the sewers and drains made or to be made upon, through, or under the said several pieces or parcels of ground and other the premises hereby agreed to be demised), To hold the said piece or parcel of ground and other the premises hereby agreed to be demised, with their appurtenances, except as aforesaid, unto the said J. W. Elliott, his executors, &c., from the 29th of September now last past, for and during and unto the full end and term of ninety-eight years thence next ensuing, and fully to be complete and ended, yielding and paying therefor for and during the first year of the said term the rent or sum of 30*l.*, and for and during the second year of the said term the rent or sum of 60*l.*, and for and during the third year of the said term the rent or sum of 120*l.*, and for and during the fourth year of the said term the rent or sum of 200*l.*, and for and during the fifth year and remainder of the said term the yearly rent or sum of 285*l.*, and that in the several proportions and manner following, that is to say, one equal third part of the said several rents unto the said Thomas Randolph and his successors, prebendaries of the prebend aforesaid, and the remaining two equal third parts thereof respectively unto the said George Charles Marquis Camden, his executors, &c. The indenture then contained a stipulation that the rents should be payable quarterly, the first quarterly payment to be due on the 25th of *December then last past, and [811 the said rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one-sixth of the clear yearly value of the land and buildings to be thereby demised, reckoning such annual value upon the said land and buildings when the same should be completely finished and fit for habitation, and be not less than 40*s.*; with a proviso, that, if the yearly rent or rents to be reserved upon or by the lease or leases to be granted of any part or parts only of the piece or parcel of ground thereinbefore described and agreed to be demised, should amount to or make up the full yearly rent or rents thereby agreed to be reserved and made payable, then and in

such case the remainder of the said piece or parcel of ground, or any part or parts thereof, should from time to time when and as the same should be built upon be demised and leased, together with the houses and buildings thereupon erected, at the yearly rent of a peppercorn only. The indenture then stated an agreement, that, in every such lease to be so granted as aforesaid, there should be contained on the part of the said J. W. Elliott, his executors, &c., such covenants as were usually inserted in leases granted on the same estate, and in particular certain stipulations therein mentioned; and that, in every such lease, there should be contained on the part of the Marquis the usual covenant entered into by him for quiet enjoyment by the lessee or lessees therein on payment of the rent and observance of the covenants therein contained. It further contained covenants by the said J. W. Elliott with the Marquis to pay the said several yearly rents thereinbefore agreed to be reserved, on the several days and times and in the proportions and manner thereinbefore appointed,—to pay all rates and taxes,—and to erect and completely finish the several brick messuages therein mentioned, &c.,—

*812] *to accept such leases as agreed,—and also a covenant, that, until the said piece or parcel of ground, and the buildings to be erected as aforesaid, should be leased in execution of the covenant in that behalf, the said J. W. Elliott, his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted as aforesaid, to such persons, and in such manner and proportions, and at such time, as the same would be payable in case such leases were actually granted; and that he or they would in the meantime until the granting of such lease or leases perform all the covenants agreed to be inserted therein, as if such lease or leases had been granted. The indenture then contained the following proviso for re-entry,—“Provided that, if the whole or any part of the said yearly rent or rents hereby or by the said leases so to be granted as aforesaid to be reserved shall be behind or unpaid for the space of twenty-one days next over or after any or either of the days or times whereon the same ought to be paid as aforesaid, or if the said J. W. Elliott, his executors, &c., shall make default in erecting, building, and finishing the several messuages, &c., then and from thenceforth, and in any of the said cases, and at any time then afterwards, it shall and may be lawful for the said George Charles Marquis Camden, his executors, &c., into and upon the same premisses, or any part thereof, in the name of the whole, wholly to re-enter, and the said J. W. Elliott, his executors, &c., and all other tenants and occupiers of the same premises, thereout and from thence utterly to expel and amove, and all and singular the same premises, or so much thereof as shall not then have been actually leased, to have again, retain, repossess, and enjoy, as in his or their first and former estate.”

*813] By an indenture dated the 31st of January, 1854, *and made between the said J. W. Elliott of the one part, and the defendant of the other part,—after reciting the said building articles of the 4th of February, 1853, and that the said J. W. Elliott had erected upon parts of the said ground certain buildings, therein described, which had been demised to him by certain indentures of lease by which ground-rents to the amount of 35*l.* had been reserved, in consideration of 1500*l.*, the said J. W. Elliott assigned unto the defendant, his executors, &c., the said recited building articles, and all the right, title, interest, property,

possession, benefit, claim, and demand whatsoever which the said J. W. Elliott then had or might have by virtue of the said indenture, and the covenants and agreements therein contained on the part of the plaintiff, into or out of the said premises therein described, subject to the performance by the defendant, his executors, &c., of the covenants therein contained, amongst others, a covenant by the defendant to perform the covenants in the said articles on the part of the said J. W. Elliott, and to indemnify the said J. W. Elliott from the same.

The defendant erected or completed, on part of the premises so assigned to him, certain messuages which, according to the contract, were demised to him by indentures of lease.

By an indenture of the 23d of May, 1857, and made between the defendant of the one part, and one George White of the other part, the defendant, for a nominal consideration, assigned to White, his executors, &c., the said building articles of the 4th of February, 1853, and all his interest therein.

The defendant had paid to the plaintiff all the rent due under the building agreement of the 4th of February, 1853, up to Lady-Day, 1857, being the last quarter-day previous to the date of the assignment to White.

*Upon proof of these facts, the learned judge directed a verdict [814 to be entered for the plaintiff for the amount claimed,—reserving leave to the defendant to move to enter a verdict for him, or a nonsuit.

Bovill, Q. C., in Michaelmas Term last, accordingly, obtained a rule nisi to enter a verdict for the defendant, on the grounds,—first, that the building-articles of the 4th of February, 1853, amounted to an actual demise,—secondly, that the defendant never took any interest except under the building agreement, and was not tenant from year to year,—thirdly, that, if there was any tenancy from year to year, Elliott became such tenant, and that tenancy was assigned to the defendant, and by him assigned over,—fourthly, that, if any rent was recoverable, it would be due to the plaintiff and Randolph or the prebendary of St. Paul's. He cited *Doe d. Walker v. Groves*, 15 East 244, and *Curling v. Mills*, 6 M. & G. 173 (E. C. L. R. vol. 46), 7 Scott N. R. 709.

Malcolm showed cause.—The articles of agreement of the 4th of February, 1853, clearly do not amount to an actual demise. The matter rests entirely in contract. The whole scope of the agreement shows that the only demise contemplated, was, a demise of each house when erected. [WILLES, J.—If the articles constitute a demise of the whole piece of land, out of what estate would the separated leases be granted?] The parties have carefully worded the agreement so as to prevent its operating as a lease. Neither did Elliott hold as tenant from year to year. He merely held under the terms of the agreement; and, by the assignment to the defendant, the latter became assignee of a chose in action; but, when he entered into possession and paid rent, he became tenant from year to year. *[WILLIAMS, J.—Does not the same argument [815 show that Elliott became tenant from year to year?] It is submitted that it does not: a tenancy from year to year in Elliott is quite inconsistent with the building agreement. The covenants entered into by Elliott in that instrument do not bind his assignee. The position of the defendant, therefore, is simply that of a man holding under the plaintiff and paying him rent. [COCKBURN, C. J.—If the terms of the agreement do not create the relation of landlord and tenant, when the

defendant becomes assignee of that agreement and goes to pay the stipulated sum under it, why is it to be assumed that he makes the payment in the character of tenant rather than as assignee of the agreement? Being bound by his agreement with Elliott, he makes the payment in discharge of that obligation. Why should the money be held to be rent in the case of the defendant, and not in the case of Elliott?] The defendant as assignee would not be bound by the covenants entered into by Elliott. He, therefore, does not hold under the articles. His is the common case of a man occupying land and paying rent,—which clearly creates a tenancy from year to year. If not tenant from year to year, the defendant was at the least tenant at will, and so liable for the rent. [The other point was waived.] *Bovill*, Q. C., and *Garth*, contra, were not called upon.

WILLIAMS, J.^(a)—I am of opinion that this rule must be made absolute, upon one of the points made (but not much insisted upon) at the trial and upon the motion. I think there was no evidence at all of any *816] *liability in the defendant to pay the sum claimed in this action. The way in which it is sought to make him liable is this:—It is contended, and I think properly contended, on the part of the plaintiff, that the agreement of the 4th of February, 1853, did not amount to a lease. So far from that instrument being intended to operate as a lease, every possible care seems to have been taken, not only to avoid its being treated as a demise, but also to prevent any estate being taken under it until the houses should be built and the leases granted. Then, it further insisted on the part of the plaintiff, that Elliott never gained a tenancy from year to year under the agreement. The reason why these arguments were urged (and, as I think, successfully urged), is, that, if that agreement amounted to a lease, then the defendant would be merely an assignee; and, having assigned over before any part of the rent claimed became due, he would be discharged, inasmuch as he would as assignee only be liable for rent accruing whilst he was in possession. That is the reason why it has been urged that the articles of the 4th of February, 1853, did not amount to a lease, and that Elliott never became tenant from year to year under them. I think Mr. *Malcolm* has made out those two propositions. But, then comes the question whether he has succeeded in showing that a tenancy from year to year subsisted between the plaintiff and the defendant. I think he has not. It seems to me to be clear that the building articles carefully exclude the acquisition of any estate by Elliott. It would perhaps be difficult to say that he did not become tenant at will: but, beyond a tenancy at will, he clearly had no estate. What, then, was Elliott's position? He had under the articles a right to enter upon the land and devote it to the purposes thereby contemplated, and for this right he was to pay an annual sum, not as *817] *rent, but as a collateral payment until the leases should be granted, and an estate thereby acquired. It is plain, therefore, that the sum stipulated to be paid by Elliott not being payable as rent for the occupation of the land, but merely a stipulated sum payable by virtue of the agreement, so far as he was concerned there is no ground for saying that he ever paid rent in the sense of creating a tenancy. But it is contended by Mr. *Malcolm*, that, when the defendant came in, the payment was to be considered as rent paid for the enjoyment of the

(a) Cockburn, C. J., was absent on account of indisposition, and Willes, J., had gone to Chambers.

land, and so a tenancy from year to year was created. It seems to me that there is no ground whatever for implying a tenancy from year to year in the defendant. Where a tenancy from year to year is implied from periodical payments, it is because you cannot account for the payment of the money upon any other hypothesis than that it is paid for rent, and hence the law implies a tenancy from year to year. But here there is no more reason for implying a tenancy from year to year after the defendant came in than there was when Elliott held the land. The defendant became liable to pay the money because Elliott had assigned the agreement to him, and he had agreed with Elliott to make the payments. I am of opinion that the only person liable in a court of law for the payment of the stipulated annual sum to the Marquis, would be Elliott himself: and that the fact of the defendant having become assignee of the agreement would not make *him* liable to the Marquis. The payments which were made by him were not made in discharge of any original liability in himself, but in discharge of the liability of Elliott, against which the defendant as assignee was bound to indemnify Elliott. It is said that the defendant held upon terms different from those under which Elliott held. But that leaves the question precisely as it was before. Can you imply from the payment of the money by the defendant, that he meant to become tenant from year to year to the plaintiff? Clearly not. The payment being due to the liability of Elliott under the agreement, there is no more reason for inferring that the defendant became tenant from year to year than that Elliott became such. Then it is said, that, if the defendant was tenant at will only, inasmuch as he continued tenant for a portion of the year, he ought to pay rent pro rata. Be it that he was tenant at will, he was not tenant at will on the terms of paying so much a year rent. The amount still remains a collateral sum, for which Elliott, and Elliott alone, was, in my opinion, liable under his agreement with the plaintiff.

CROWDER, J.—I also am of opinion that this rule should be made absolute, though not precisely on the grounds upon which it was moved. The first of these was, that the building-articles of the 4th of February, 1853, amounted to a demise of the land to Elliott. I am clearly of opinion that those articles did not amount to an actual demise. At first I was inclined to think that they did: but, upon looking more closely at the instrument, it seems to me to have been the intention of both parties to exclude the passing of any estate. In substance it amounts to this:—Certain land was staked out, upon which houses were from time to time to be erected, and, when and as one or more of the houses so agreed to be built were covered in, leases were to be granted; and for this certain annual sums were to be paid from time to time. The expression used is “rent or sum:” but the word rent was probably inserted from the difficulty of distinguishing between rent which would be payable under the intended leases, and the annual payments to be made for the right to occupy the land for the purpose of erecting the houses thereon in the meantime. There are also expressions about re-entering and re-possessing the land for covenants broken. But I think it is clear, upon the whole instrument, that nothing was intended to be demised until the buildings should from time to time be erected; and that no tenancy was thereby created. Elliott entered under the agreement, and commenced building, and

afterwards assigned all his interest in the agreement to the defendant, who completed two houses upon the land. I am clearly of opinion that there was no actual demise, and no tenancy from year to year. The next point made in the rule, is, that the defendant never took any interest except under the building agreement, and was not tenant from year to year. Upon that ground, I think the defendant is entitled to succeed, though not in the way in which it was presented to the court on moving for this rule. It seems to me that the defendant never became tenant from year to year. It was insisted, that, under the agreement of the 4th of February, 1853, Elliott became tenant from year to year; and, if so, Elliott having assigned his interest to the defendant, and the defendant having assigned to White before any of the rent claimed in this action became due, the defendant could not be liable. Mr. *Malcolm* has, however, satisfied me that Elliott never became tenant from year to year under the agreement. His position was rather that of tenant at will,—that is, he was not in as a trespasser, but the annual payment was not a payment as or in the nature of rent, but a stipulated collateral payment under the articles. Then it is contended, on the part of the plaintiff, that, assuming Elliott not to have been tenant from year to year, yet the defendant, from the altered circumstances, became so. That argument, however, clearly fails. By the assignment to him, the defendant became so far placed in the *820] position of Elliott that he might well make the annual payment stipulated to be paid by Elliott under the building-articles. It is said, that, because the defendant paid the money, and because it was a payment in the nature of rent, he thereby became tenant from year to year to the marquis. But it seems to me that the existence of a tenancy from year to year is negatived by all the evidence in the case. It is clear that the defendant was acting merely as Elliott acted. It does not in my opinion follow from the altered circumstances that the payment was made by the defendant as rent. It is true, the defendant was not under covenant with the plaintiff to make the payments: but they were made in discharge of Elliott's liability, pursuant to the defendant's bargain with Elliott. He was merely carrying out Elliott's engagement under the stipulations he had entered into with Elliott. I agree with my Brother Williams, that, when a tenancy from year to year is implied from the payment of rent, it is only where the payment can be referred to nothing else. Here, however, there is no necessity for any such inference: the facts negative the inference of a tenancy from year to year. What, then, is the condition of the defendant? Assuming him to have been tenant at will, he was not tenant at a rent: the payment was a mere collateral payment, referable to the agreement, and to nothing else. As between the plaintiff and defendant, the payment clearly was not enforceable. The plaintiff's only remedy at law is against Elliott. The rule must, therefore, be made absolute.

Rule absolute.(a)

(a) See *Alexander v. Bennin*, 6 Scott 611, 4 N. C. 799.

The judgment in this case was there delivered will be found reported affirmed on error to the Exchequer among the "Additional Cases" at the Chamber: 28 L. J., C. P. 337; 5 end of the present volume: See post, Jurist, N. S. 1405. The opinions p. 896.

***THE EASTERN COUNTIES RAILWAY COMPANY v. [821
DORLING. Feb. 12.**

To a declaration charging the defendant with breaking and entering upon a certain dummy or landing-stage of the plaintiffs, the same being a barge of the plaintiffs, moored to a wharf in the river Orwell, and embarking and disembarking from the same passengers and others on, to, and from divers ships and vessels, and mooring ships and vessels against the same,—the defendant pleaded that the Orwell was a public and common navigable river and common highway; that he had a right to land and was desirous of landing passengers from his steam vessel at the wharf; that the plaintiffs' dummy or landing-stage at the time when, &c., was permanently moored and fixed alongside the wharf so that his passengers could not embark or disembark there without his vessel being moored thereto and his passengers passing over the same, &c.:—Held, on demurrer, a sufficient answer to the declaration,—the dummy appearing to be a permanent obstruction of the defendant's right to use the river as a highway, which he could only exercise by removing it or passing over it.

Issue having been taken upon the above and other pleas, the cause went down to trial, when it appeared that the dummy was moored to the wharf so as to rise and fall with the tide, that vessels could not if the dummy had not been there have approached the wharf at low water, and that the defendant claimed the right of landing at all times over the dummy:—Held, that if the plaintiffs had intended to complain of the defendant's exercise of his supposed right at times of low water, when he could not have come to the wharf if their dummy had been there, they should have new assigned.

There was evidence of a custom for barges or other vessels arriving at a wharf for the purpose of loading and unloading, to pass for that purpose over any other barge or vessel, moored alongside a wharf and thereby preventing access to it otherwise:—*Quære*, whether such custom applied to a thing like this, which was a mere landing-stage for steamboat passengers.

THIS was an action brought by the Eastern Counties Railway Company against the defendant for an alleged trespass.

The declaration stated that the defendant broke and entered upon a certain landing-stage or dummy of the plaintiffs, the same being a barge of the plaintiffs, moored to a certain wharf in the river Orwell, and with feet in walking and otherwise walked and trespassed upon the same, and embarked and disembarked from the same divers persons and passengers and others on, to, and from divers ships and vessels, and navigated, moored, and fastened divers ships and vessels upon and against the same.

The defendant pleaded,—first, not guilty,—secondly, a traverse that the landing-stage or dummy was the landing-stage or dummy of the plaintiffs,—thirdly, leave and license.

Fourth plea,—that the said river Orwell, and that part thereof in which the said barge of the plaintiffs at the said time when, &c., was moored as in the declaration and thereafter mentioned, was and still is a public and common navigable river, and the Queen's *ancient [*822 and common highway for all the liege subjects of our lady the Queen with their ships and other vessels to navigate, sail, pass, and re-pass in, upon, and through the same, and over all parts thereof, every year and at all times of the year, and at all times and states of the tides of the said river, at their free will and pleasure, and that the said part of the said river then was and still is open to the sea, and having a free passage in and from the same for ships and other vessels, and was and still is within the flux and reflux of the tide of the sea, and the tide of the sea before and at the said time when, &c., flowed and reflowed, and still flows and reflows, in the said part of the said river: That, at the said time when, &c., the said barge of the plaintiffs was moored in a

certain part of the said river lying and being within the port of Ipswich, and that there now is, and from time whereof the memory of man runneth not to the contrary hath been, a certain ancient and laudable custom used and approved of within the port of Ipswich, that is to say, that all and any ships, vessels, boats, or barges trading or being in the said river, within the said port, might be laid and moored alongside the quays, wharves, and banks abutting on the said river, for the purpose of persons embarking or disembarking, and goods being laden upon and unladen from on board the said ships, boats, and barges, at, from, or upon the said quays, wharves, and banks of the said river, and that the said ships, vessels, boats, and barges might remain and continue so laid and moored for the purpose aforesaid until the said persons, goods, wares, and merchandise should be so embarked, disembarked, laden, or unladen as aforesaid, and that the said persons, goods, wares, and merchandise might be so embarked, disembarked, laden, or unladen as aforesaid at the said quays, wharves, and banks; and that, when and so often as it *823] should so happen that *one ship, vessel, boat, or barge should be laid or moored alongside part of any of the said quays, wharves, or banks, so that another ship, vessel, boat, or barge should be unable to be laid or moored alongside that part of the quays, wharves, or banks at which such ship, vessel, boat, or barge was so laid or moored alongside as aforesaid, and another ship, vessel, boat, or barge upon or from which the persons, goods, wares, and merchandises were entitled to be embarked, disembarked, laden, or unladen upon or from the said part of the said quay, wharf, or bank at which the said ship, vessel, boat, or barge might be so laid or moored alongside as aforesaid, should arrive at the said last-mentioned part of the said last-mentioned quay, wharf, or bank, while the said ship, vessel, boat, or barge should be so laid or moored as aforesaid, then that the said ship, vessel, boat, or barge so arriving might be laid or moored alongside to the said ship, vessel, boat, or barge so then already laid or moored alongside the said last-mentioned part of the said quay, wharf, or bank as aforesaid, for the purpose aforesaid; and that persons might embark or disembark, and that goods, wares, and merchandise might be laden or unladen upon or from the said ship, vessel, boat, or barge so arriving as aforesaid; and that for that purpose the said last-mentioned persons might of right go, pass, and repass, and the said last-mentioned goods be carried upon and over the said ship, vessel, boat, or barge so firstly laid or moored alongside as aforesaid, unto, upon, or from the said part of the said quay, wharf, or bank against or alongside which the said last-mentioned ship, vessel, boat, or barge was so laid or moored as aforesaid: That, just before the said time when, &c., a certain vessel of the defendant upon which divers persons, goods, wares, and merchandise which the defendant was entitled *824] to *disembark and unlade upon a certain part of a certain quay abutting upon a certain part of the said river, within the said port, and which said last-mentioned vessel was then lawfully navigating the said river in the said highway, then arrived at the last-mentioned part of the said river and of the said last-mentioned quay, and the defendant was then minded and desirous, and was lawfully entitled, to disembark the said last-mentioned persons and unlade the said last-mentioned goods, wares, and merchandise from the said last-mentioned vessel

at the said last-mentioned part of the said river, and the said last-mentioned part of the said last-mentioned quay; and that, at the time the said vessel of the defendant so arrived at the said last-mentioned part of the said river as aforesaid, and thence until and at and after the said time when, &c., the said barge of the plaintiffs was and continued laid and moored in the said last-mentioned part of the said river alongside the said last-mentioned quay, so that the said last-mentioned persons, goods, wares, and merchandise to be, and which then were in and on board of the defendant's said vessel, could not be, laden and embarked and disembarked or unladen from the same at the said last-mentioned part of the said last-mentioned quay, without the defendant's said last-mentioned vessel being moored and fastened against the said barge of the plaintiffs, or without the said last-mentioned persons and others to carry, and carrying, the last-mentioned goods, wares, and merchandise, entering upon and walking and passing over the said barge of the plaintiffs; wherefore the defendant, in order to disembark the said last-mentioned persons, and unlade the said last-mentioned goods, wares, and merchandise at the said last-mentioned part of the said quay, in the exercise of his right under and by virtue of the said custom, and because he could not otherwise *do so, committed the said trespass complained of: and that the alleged trespasses were an use by the defendant of the said custom, and only what he was entitled to do under and by virtue of the same. [*825

Fifth plea,—that the said river Orwell, and that part thereof in which the said barge of the plaintiffs at the said time when, &c., was moored as in the declaration and hereinafter mentioned, was and still is a public and common navigable river, and the Queen's ancient and common highway for all the liege subjects of our lady the Queen with their ships and other vessels to navigate, sail, and pass, and repass, in, upon, through and over the same and all parts thereof, every year, and at all times of the year, and at all times and states of the tide of the said river, at their will and pleasure; and that the said part of the said river then was and still is open to the sea, and having a free passage in and from the same for ships and other vessels, and was and still is within the flux and reflux of the tide of the sea, and the tide of the sea before and at the said time when, &c., flowed and reflowed, and still flows and reflows in the said part of the said river; and that, just before the said time when, &c., a certain vessel of the defendant, upon which divers persons, goods, wares, and merchandise which the said defendant was entitled to disembark and to unlade upon a certain part of a certain quay abutting upon the said part of the said river, and which said last-mentioned vessel was then lawfully navigating the said river in the said highway there, arrived at the said last-mentioned part of the said river, and the said last-mentioned part of the said last-mentioned quay; and the defendant was then minded and desirous and was so entitled as aforesaid to disembark the said last-mentioned persons and unload the said last-mentioned goods, wares, and merchandise from the said last-mentioned vessel at the said last-mentioned river, and at the last-mentioned *part of the said quay: and that, at the time the said vessel of the defendant so arrived at the said last-mentioned part of the said river as aforesaid, and thence until and at and after the said time [*826

when, &c., the said landing-stage or dummy of the plaintiffs, being a barge boarded over and made into a floating landing-place for the embarkation and disembarkation of persons, and the lading and unloading of goods, wares, or merchandise on and from on board of vessels arriving at the said quay, was then permanently moored and fixed there, and was a permanent erection for the purpose of persons so embarking and disembarking, and of goods, wares, and merchandise being so laden and unladen upon and by means of the same, and the said landing-stage or dummy was then and during the time aforesaid so moored and fixed as aforesaid wrongfully in a part of the bed and course of the said river, alongside the said last-mentioned part of the said last-mentioned quay, and then wrongfully covered and obstructed the said part of the bed and course of the said river and highway there, so that it was impossible for the said last-mentioned persons, goods, wares, and merchandise who and which were then in and on board of the defendant's said vessel, to disembark or be unladen from the same at the said last-mentioned part of the said last-mentioned quay, without the defendant's said vessel being moored and fastened against the said barge of the plaintiffs, or without the said last-mentioned persons and others to carry, and carrying, the said last-mentioned goods, wares, and merchandise, entering upon and walking and passing over the said barge of the plaintiffs; and the said barge of the plaintiffs then was a common and a public nuisance upon and to the said highway, and to all persons sailing, passing, or navigating upon or over the same; wherefore the defendant, in order to disembark the said last-mentioned *827] *persons and unload the said last-mentioned goods, wares, and merchandise at the last-mentioned part of the said quay, in the exercise of his right so to do, and because he could not otherwise do so, and solely in order to do so, committed the said trespasses complained of, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiffs in that behalf.

Sixth plea. The defendant repeats the several allegations, statements, and averments in the said fifth plea contained, except so far as the same states or alleges that the plaintiffs' said landing-stage or dummy was wrongfully moored or fixed in the said river, and that the same was a common or public nuisance as in that plea mentioned.

The plaintiffs joined issues upon these several pleas, and also demurred to the last plea.

The cause was tried before Williams, J., at the last Summer Assizes for the county of Suffolk, when the following facts appeared in evidence:—

The Eastern Union Railway Company had established, in connection with their railway, a line of steam-packets between Ipswich and Harwich. For the convenience of embarking and disembarking passengers at Ipswich, the company, with the permission of the owner, placed a "dummy," or flush-decked barge, in the river Orwell, opposite a wharf called Griffin's Wharf. This dummy was fastened by means of chains to the wharf and to a mooring-stone sunk into the bed of the river, so as to rise and fall with the tide; and without it it would have been impossible for boats to land or embark passengers at the wharf at low water.

The Eastern Union Railway Company having transferred their line, together with their steamboat *establishment, to the Eastern Counties Railway Company, the latter company became possessed of this dummy. [*828

The defendant, who had formerly been in the service of the company as superintendent of the steam-packets, set up an opposition steam-packet to run between Ipswich and Harwich. Having the permission of the owner of Griffin's Wharf to land and embark passengers there, and the plaintiffs' dummy occupying the whole frontage, the defendant insisted upon his right to go alongside the dummy at all times of the tide for that purpose. And this was the trespass complained of.

It was proved, that, but for the plaintiffs' dummy being moored as it was, the defendant's steamboat could have got alongside the wharf at all times at high water, but not at low water; and that he insisted upon his right to use the dummy at *all* times.

In support of the custom alleged in the fourth and sixth pleas, the defendant proved, that, according to the usage of the port, whenever a barge or other vessel was moored alongside of a wharf for the purpose of loading or unloading, so as to prevent another vessel getting alongside the wharf, such last-mentioned vessel might be placed alongside the former, and her people pass over her for the purpose of loading and unloading.

The jury, in answer to questions put to them by the learned judge, found that the custom existed as alleged in the pleas; that the defendant could not land at the wharf without going over the plaintiffs' dummy; and that, on some occasions he might, though on others (according to the state of the tide) he could not have landed and embarked his passengers on the wharf, if there had been no dummy there.

A verdict was thereupon entered for the defendant upon the fourth and sixth issues, and for the plaintiffs on the rest.

O'Malley, Q. C., in Michaelmas Term last, on the part of the plaintiffs, obtained a rule calling upon the defendant to show [*829 cause why the verdict found for him on the fourth plea should not be set aside, and instead thereof a verdict be entered thereon for the plaintiffs with nominal damages, pursuant to leave reserved at the trial, on the ground that that plea was not proved; and why the verdict found for the defendant on the sixth plea should not be set aside, and instead thereof a verdict be entered thereon for the plaintiffs, on the ground that there was no evidence in support thereof; or why the verdict should not be set aside, and a new trial had, on the ground that the verdict was against the evidence: or why judgment should not be entered for the plaintiffs on the fourth plea non obstante verdicto, on the ground that the custom alleged was unreasonable and bad. He submitted that there was no evidence that the custom, if good, applied to *passenger vessels*, and that there was no evidence that a "dummy" had ever been placed on the river before.

Power, Q. C., for the defendant, also moved for a new trial, on the ground that the verdict on the fifth issue (that the dummy was a public nuisance) ought to have been found for defendant: but the court declined to grant a rule.

Power, Q. C., and *H. Mills*, in Hilary Term, showed cause against the plaintiffs' rule.—The declaration charges the defendant with a tres-

pass on their dummy or landing-stage moored in the river Orwell. The fourth plea in substance states, that the Orwell is a public and common navigable river, that the plaintiffs' barge (dummy) was moored therein; that, by the custom of the port of Ipswich, when a barge or other vessel is *830] moored alongside a wharf so that another *vessel cannot get to the wharf, the latter may pass over the former for the purpose of landing and embarking persons and goods entitled to land at the wharf; that the plaintiffs' dummy was so moored alongside the wharf at which the defendant was entitled to land and embark his passengers and goods, that he could not land them without passing over it; and that the trespasses complained of were an use by the defendant of the said custom, and only what he was entitled to do under and by virtue of the same. The sixth plea, which is substantially the same as the fourth, treats the barge or dummy as permanently fixed, without alleging it to be a public nuisance, and justifies the passing over it. The custom proved is not the less applicable because the vessel which was moored alongside the wharf was a "dummy," and not a real vessel: *The Mayor, &c., of Carlisle v. Wilson*, 5 East 2; *Cowling v. Higginson*, 4 M. & W. 245;† *Dare v. Heathcote*, 25 Law J., Exch. 245. [CROWDER, J.—If the custom be good as to a vessel moored to the wharf for a limited time, it would be absurd to hold that it did not apply to a dummy.] The dummy being moored against the wharf, so that the defendant's access thereto was thereby obstructed, he had a right to go over it. If the plaintiffs had intended to insist that the defendant trespassed on their dummy at other times than those at which it formed an obstruction, they should have new assigned,—the Common Law Procedure Act, 15 & 16 Vict. c. 76, having made no difference in this respect: see *Glover v. Dixon*, 9 Exch. 158.† [WILLIAMS, J., referred to *Bowen v. Jenkin*, 6 Ad. & E. 911 (E. C. L. R. vol. 33), 2 N. & P. 87. There, in case by a commoner for disturbing his common by putting on cattle, the defendant pleaded a right of common appurtenant for cattle levant and couchant, that the cattle in the declaration mentioned were the defendant's *831] own commonable cattle levant and *couchant, and that he put them on to use the common, &c. The plaintiff replied that "all the said cattle in the declaration mentioned" were not the defendant's own commonable cattle levant and couchant, in manner and form, &c. It was held that the defendant maintained his issue by showing, that, on the occasion of every alleged disturbance, some of the cattle put on were levant and couchant; and that, on these pleadings, the plaintiff could not insist on a surcharge,—the word "all" being interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle; not that it was truly alleged of some, and falsely of others. Lord Denman there said: "If the plaintiff had stated in his declaration (as he might have done, though he was not bound to do) that the defendant, being a commoner, had put on cattle which were not levant and couchant, and the defendant had asserted in his plea that they were levant and couchant, doubtless he must fail, unless he could prove by his evidence that all the cattle which the plaintiff proved to have been put on the common by him were levant and couchant." In the note (6) to *Green v. Jones*, 1 Wms. Saund. 299, it is laid down, that, "where the defendant has committed several trespasses either upon the person, goods, or land of another, some of which are justifiable and others not,

and the action is brought for those trespasses which are *not* justifiable, but the defendant by his plea answers those only which *are*, the plaintiff by his replication should make a new assignment." Again, p. 299 *h*, the learned editor says: "A new assignment is used to ascertain with precision and exactness the time or place which had been alleged only generally in the declaration. It is also used to explain that more fully which is only *apparently* answered by the plea. As, where the plea covers the whole trespass (which it must do, otherwise *it would be bad on demurrer), but mistakes it, that is, *does not hit*, if I [*832 may so say, either wilfully or ignorantly, the whole or some part of the trespass which the plaintiff intended in his declaration, the plaintiff must new assign, to explain." In *Monprivatt v. Smith*, 2 Campb. 175 (cited with approbation in 1 *Smith's Leading Cases*, 4th edit. 106), to trespass for breaking and entering a house and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours; and it was ruled that the plea covered the whole declaration. [WILLIAMS, J.—If the plaintiffs had applied to amend at the trial, I should have allowed it to be done immediately.] That would scarcely have been just, seeing that the defendant went down prepared to try the general right. The declaration being restricted to a single act of trespass, the plaintiff could not, it is submitted, new assign; nor could he be allowed to traverse and new assign. [WILLES, J.—Why not?] In note (*n*), in 1 *Wms. Saund.* 300 *d*, it is said, that, "where a single act of trespass is laid in a declaration without 'divers days and times,' and the defendant's plea in justification covers that act, to which the plaintiff replies, he cannot also new assign: *Taylor v. Smith*, 7 Taunt. 156 (E. C. L. R. vol. 2). So, where the declaration contains several counts, each alleging a single act of trespass, and the defendant pleads a separate plea of justification to each count, the plaintiff cannot take issue on such justifications and also new assign another act of trespass; for, such replication and new assignment are double, and extend the cause of complaint beyond what is contained in the count: *Chesley v. Barnes*, 10 East 73." [WILLES, J.—All that that proves, is, that you cannot by a new assignment enlarge the cause of complaint. But, as a general proposition, I do not agree with you. You must make *out, that, where the plaintiff alleges the grievance without days, he cannot under that prove acts of tres- [*833 pass on more than one day. COCKBURN C. J.—What is to prevent us from adding a new assignment now?] It is submitted that the court has no power on the discussion of this rule to make such an amendment as that. [WILLES, J.—We certainly assume to have such power, in *Carpenter v. Parker*, 3 C. B. N. S. 206 (E. C. L. R. vol. 91).] That was a special case; and the course pursued was not objected to. All that the defendant had to show, upon the fourth plea, was, that he had a right to go the wharf for the purpose of landing and embarking his passengers, and to pass over the plaintiffs' dummy. Without any custom at all,—subject to the variation introduced by the sixth plea, that the dummy was permanently fixed,—it is impossible to distinguish this from the ordinary case of a man having a right of way which is obstructed.

O' Malley, Q. C., and *David Kean*, in support of the rule, and of the demurrer.—The fourth plea was not proved: and, even if it was, it is a VOL. V., C. B. (N. S.)—81

bad plea, the custom therein alleged being clearly unreasonable. There was no evidence, assuming the custom to be a reasonable one, of its ever having been applied to any but cargo-bearing ships. This dummy was a thing of a totally different character: it is fastened by mooring-chains to the wharf and to the bed of the river; and is used as a mere landing-stage or projection into the river for the purpose of facilitating the embarking or disembarking of passengers when the state of the tide precludes the approach of the steam-vessel. It is a thing which is rateable to the relief of the poor: *The Queen v. Forrest*, 27 Law J., M. C. 96. The custom is laid in general terms, and is applicable to the whole *834] frontage of the port of Ipswich. [WILLIAMS, J.—No *objection was taken at the trial to this part of the custom not having been proved. If there had been, I should have amended the plea. There was quite evidence enough to support a custom to justify the defendant.] The evidence was, that the right was subject to the payment of wharfage: see *Paddock v. Forrester*, 3 M. & G. 903 (E. C. L. R. vol. 42), 3 Scott N. R. 715, 1 Dowl. N. S. 527. As to the sixth plea,—If that plea is bad on demurrer for not averring that the landing-stage or dummy of the plaintiffs was a public nuisance, the finding of the jury is immaterial. But, if the plea is good, it can only be so because the word “permanently” gives to the other statements in the plea the character of a nuisance; and, the question having been submitted to the jury, and they having found that it was not a nuisance, the plaintiffs are entitled to a verdict upon that issue. The river Orwell being a public highway, the defendant had first to make out that his right of access to the wharf was obstructed. Having made out that, he might have a right to remove the obstruction; but he could not justify walking over it. Unless the defendant has a right of action, he has no right at all: and his right of action depends upon the thing causing the obstruction being a public nuisance and causing him a private and particular damage. This was not necessarily a nuisance because a permanent structure. Hale, *De Portibus Maris* 85, gives instances of “such nuisances as are common to all men that have occasion to come, go, or stay at ports.” Amongst others,—“1. Silting or choking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port, whereby it is choked. 2. Decays of the wharfs, keys, and piers, which are for the landing of merchandize and the safeguard of shipping. 3. The leaving of anchors in the port without buoys or marks, whereby *835] ships or vessels may strike against them and be *spoiled.(a) 4. The building of new wears or enhancing of old, whereby navigation or passage of vessels is obstructed. 5. The straitening of the port, by building too far into the water, where ships or vessels might have formerly ridden; for, it is to be observed that nuisance or not nuisance in such case is a question of fact. It is not therefore every building below the high-water mark, nor every building below the low-water mark, is ipso facto in law a nuisance. For that would destroy all the keys that are in all the ports in England. For they are all built below the high-water mark; for, otherwise, vessels could not come at them to unlade; and some are built below the low-water mark. And it would be impossible for the King to license the building of a new wharf or

(a) See *Hancock v. The York, Newcastle, and Berwick Railway Company*, 10 C. B. 348 (R. O. L. R. vol. 70).

key, whereof there are a thousand instances, if ipso facto it were a common nuisance, because it straitens the port, for the King cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea-water from diffusing at large; and the water may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the King's, the building below the high-water mark is a purpresture, an encroachment and intrusion upon the King's soil, which he may either demolish, or seize, or arent at his pleasure; but it is not ipso facto a common nuisance, unless indeed it be a damage to the port and navigation. In the case, therefore, of building within the extent of a port in or near the water, whether it be a nuisance or not is *quæstio facti*, and to be determined by a jury upon evidence, and not *quæstio juris*." [COCKBURN, C. J.—The plea does not allege that the dummy was wrongfully there; nor does it show *that it had not been there as long as the wharf itself. Suppose I have a right [*836 of way, and you obstruct it by placing a hurdle across it,—may I not get over it?] You may possibly have a right to remove it, but nothing more. The authorities are numerous to show that the mere fact of a structure being obstructive of a river or a highway gives no right of action, unless some private and particular injury results therefrom to the party complaining: *The King v. Russell*, 6 B. & C. 566 (E. C. L. R. vol. 13); *The King v. Ward*, 4 Ad. & E. 384 (E. C. L. R. vol. 31); *The King v. Tindall*, 6 Ad. & E. 143 (E. C. L. R. vol. 33), 1 N. & P. 719 (E. C. L. R. vol. 36); *Rex v. Lord Grosvenor*, 2 Stark. N. P. C. 511 (E. C. L. R. vol. 3); *Wilkes v. The Hungerford Market Company*, 2 Scott 446 (E. C. L. R. vol. 30), 2 N. C. 281 (E. C. L. R. vol. 29); *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 241;† *The Mayor of Colchester v. Brooke*, 7 Q. B. 339 (E. C. L. R. vol. 53); *Wiggins v. Boddington*, 3 C. & P. 544 (E. C. L. R. vol. 14). In *Bateman v. Bluck*, 18 Q. B. 870 (E. C. L. R. vol. 83), to trespass for entering the plaintiff's close and pulling down a wall thereon, the defendant pleaded that the close was a public pavement within the Metropolitan Paving Act, 57 G. 3, c. xxix.; that the plaintiff unlawfully and contrary to the act erected thereon the said wall; and, because the wall encumbered the pavement, and the plaintiff refused, on the defendant's request, to remove the same, the defendant entered and pulled it down: and it was held, on motion for judgment non obstante veredicto, that the plea was bad for not showing that it was absolutely necessary for the defendant, in order to exercise the alleged right of passage, to remove the wall. *Dimes v. Petley*, 15 Q. B. 276 (E. C. L. R. vol. 69), is to the same effect. The plea was not proved. The obstruction clearly was not a permanent one. And the plaintiffs were in the exercise of a right at least concurrent and commensurate with that of the defendant. The utmost the defendant could be entitled to would be an action for the wrong done to him by the obstruction, and not a right to *redress himself by trespassing upon the plaintiffs' property,— [*837 according to the distinction pointed out by Bracton, lib. iv., c. 37. between *nocumentum justum*, and *nocumentum injuriosum*.

The Court, without calling upon *Power* and *Mills* to support the demurrer to the sixth plea, expressed a desire to consider the fourth plea and the general question. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court:—

We intimated during the argument our opinion that the fourth plea was not proved, and stated our reasons for that opinion. We took time to consider, as to the second plea, first, whether upon the demurrer it could be sustained in point of law, and, secondly, how the rule to enter a verdict thereon for the plaintiffs should be disposed of.

Upon the demurrer we think judgment ought to be entered for the defendant. The plea in effect states that the defendant had a right to land at a quay upon the bank of a public navigable river, and that the plaintiffs permanently moored their dummy so as to obstruct and prevent the defendant's approach to the quay, and so that it was impossible for him to land without passing over the dummy; and so justifying passing over it, doing no unnecessary damage to the plaintiffs in that behalf. The plaintiffs, therefore, are alleged by the plea to have prevented the defendant's approach to his quay over the river, which was a public highway, by substituting for the part of the river which the dummy occupied the dummy itself, and making it, instead of the river, the means and the only means of passing over that space. The dummy is *838] further *alleged to have been permanently fixed, which must mean at least that it would require time and labour to remove it, and, it may be, means which the defendant had not at hand. And, lastly, it is stated that the defendant could not have landed except by passing over the dummy, and that no unnecessary damage was done to the plaintiffs.

Under these circumstances, the defendant had a right to use the river as a highway until he got near enough to the quay to exercise his right of landing upon it, subject of course to the reasonable use of the river by persons having a priority over him in point of time. The plaintiffs' dummy was placed where it was, not for the use by it of the river as a highway, but permanently, in order to make that part of such highway more commodious for the plaintiffs' own use, otherwise than by the dummy; and it was intended to remain there; and it interfered with the right of the defendant to pass over the place as a way, which right he could not exercise in any other manner than by removing or passing over the dummy.

The defendant, therefore, was entitled to abate the nuisance to him thereby caused, and to effect that by its removal: and we cannot see that the course actually pursued by him involved the assumption of any greater control over the plaintiffs' property, and it is impliedly stated not to have been more injurious to them, than such removal would have been. Moreover, if the defendant were compelled to remove the dummy, instead of passing over it as he did, he must have been subjected to injurious delay. It appears to us, therefore, that, upon the principle of the authorities collected in 2 Roll. Abr. *Trespass, Justification, sur default ou act del plaintiff meeme*, the plea is good, and there must be judgment for the defendant on the demurrer.

As to the rule to enter the verdict for the plaintiffs *upon *839] the sixth plea, we are of opinion, subject to what we shall presently say as to a new trial, that the rule ought to be discharged. The declaration is general, for trespasses upon the dummy. The plea justifies such trespasses at times when the defendant could have exercised the right of landing there set up, but for the obstruction caused by the plaintiffs. At the trial it appeared that he committed trespasses by

landing upon the dummy, both when the tide was high, and when but for the dummy being there he could have landed (so that it was at such times an obstruction to his landing), and also when the tide was so low, that, had the dummy not been there, he could not have landed, so that it did not at such times constitute an interference with his right. The landing on the occasions in the former class, when the defendant could have landed but for the dummy, by getting up to the quay, was, for the reasons already stated in giving judgment upon the demurrer, justifiable. The landing upon the occasions in the latter class, when if the dummy had not been there, the defendant could not have got up to the quay, and when he could not have landed but for the dummy, was not justifiable: and, if the plaintiffs had new assigned in respect of those occasions, they would have been entitled to a verdict for nominal damages in respect of them. It was, however, insisted, for the defendant, that such a new assignment was necessary: and we are of that opinion. The declaration is in a general form, and applicable to either class of trespasses: and the defendant was justified in respect of one class, viz. that of trespasses committed upon occasions when the dummy did interfere with his right to land, and it is *prima facie* a good answer to the whole declaration. In such a case, the plaintiff ought to new assign that he proceeds, or proceeds also, in respect of the class of trespasses to which *the plea is not directed: and upon this ground the plaintiffs' rule as to the sixth plea ought to be discharged. [840

Inasmuch, however, as the right of using the dummy when the tide was low and the defendant could not have landed without it, was doubtless the substantial question in dispute, and upon that we are of opinion against him, so that the merits are with the plaintiffs, we think the rule ought to be made absolute for a new trial, the plaintiffs being at liberty, in order to avoid further objection, to amend the declaration, by stating that the trespasses were committed on divers days, and also to new assign,—the costs to the defendant's costs in the cause.

Rules accordingly.

FARRALL v. HILDITCH. Feb. 12.

An indenture made between the plaintiff and defendant recited that the former was seised or entitled to certain hereditaments and premises, subject to a mortgage and further charge, that he was indebted to the defendant in the sum of 100*l.* for goods sold and delivered, that the defendant had commenced an action against him to recover the same, and that the plaintiff, being desirous of staying the action and of securing to the defendant the payment of his debt, had proposed and agreed to convey the hereditaments and premises to him, subject to the encumbrances, upon certain trusts for securing the same. It then recited as follows,—“and it has also been agreed between the [plaintiff] and [defendant] that he the [defendant] shall be at liberty to sign judgment in the said action so commenced against the [plaintiff] as aforesaid, but that no execution shall issue thereon until this present security be realised.” The indenture then proceeded to convey the premises to the defendant upon certain trusts:—Held, that the latter recital amounted to a covenant by the defendant not to issue execution until the realization of the security.

THIS was an action for a breach of covenant.

The declaration stated, that, before and at the time of making the inden-

ture thereafter mentioned, the plaintiff was entitled to certain hereditaments, subject to certain indentures of mortgage and further charge, and was indebted to the defendant in 100*l.*, for which the defendant had commenced an action against the plaintiff; and thereupon, theretofore, to wit, *841] on the *23d of April, 1857, an indenture was made by and between the plaintiff and the defendant, which, after reciting that the plaintiff was entitled to the said hereditaments as aforesaid, subject as aforesaid, and was indebted to the defendant in the said sum of 100*l.*, contained the following words, that is to say,—And whereas the said Charles Hilditch (meaning the defendant) having recently commenced an action against the said Richard Farrall (meaning the plaintiff) for the recovery of the said sum of 100*l.* so due to him as aforesaid, and he the said Richard Farrall being desirous of staying such action, and of securing unto the said Charles Hilditch the payment of the said sum of 100*l.* sought to be recovered by such action, hath proposed and agreed to convey and assure the said hereditaments and premises, subject to the said several encumbrances thereon mentioned in the said schedule, unto the said Charles Hilditch and his heirs, upon the trusts thereafter mentioned for securing the said debt or sum of 100*l.* so due to the said Charles Hilditch: and it has been also agreed between the said Richard Farrall and Charles Hilditch, that he the said Charles Hilditch shall be at liberty to sign judgment in the said action so commenced against the said Richard Farrall as aforesaid, *but that no execution shall issue thereon until this present security be realized*: and it was by the said indenture witnessed, that, in pursuance of the said recited agreement, and in consideration of the said sum of 100*l.*, the plaintiff granted, released, and conveyed to the defendant and to his heirs the said hereditaments, to hold the same to the defendant and his heirs, to the use of the defendant, and, subject to the said indenture of mortgage and further charge, upon trust that the defendant should forthwith enter into the possession and *842] receipt of the rents and profits of, and with all convenient *speed absolutely sell and dispose of, the said hereditaments as therein mentioned: and it was thereby declared that the defendant should stand possessed of the moneys to arise from the said sale or sales, and the said rents and profits, upon trust, first, to discharge certain costs, charges, and expenses therein mentioned, secondly, to pay and satisfy the principal and interest arising on the said indentures of mortgage and further charge, together with all costs and expenses, if any, attending to the non-payment of the same, and, subject thereto, to retain and pay himself the said sum of 100*l.* and interest thereon, as therein mentioned: Averment, that the plaintiff did all things necessary on his part to entitle him to have the said covenant or agreement as to not issuing execution until the said security was realized, performed by the defendant: Yet that the defendant, contrary to the said covenant or agreement, issued execution on the said judgment so signed in the said action before the said security was realized, and seized and sold under such execution the plaintiff's goods before the said security was realized, whereby the plaintiff's credit and trade was destroyed, and he was put to great expense in endeavouring to pay out and get rid of the said execution, and was and is otherwise injured, &c.

The defendant pleaded, that he did not make the covenant or agreement in the declaration alleged to have been broken; and that the said

indenture contained divers other provisions, covenants, and stipulations of and concerning the said 100*l.* and payment of the same, and other matters. Issue thereon.

The cause was tried before *Whately*, Q. C., at the last assizes at Stafford. The plaintiff put in the deed upon which the declaration was founded, and which was in the following terms:—

"This indenture, made the 23d day of April, 1857, *between [*843 Richard Farrall, of Kidsgrove, in the parish of Wolstanton, in the county of Stafford, grocer and provision dealer, of the one part, and Charles Hilditch, of Audley, in the said county of Stafford, gentleman, of the other part: Whereas the said Richard Farrall is seised of or otherwise entitled to the messuage, tenement, or dwelling-house, shop, hereditaments, and premises hereinafter described and intended to be hereby conveyed and assured, subject to the several indentures of mortgage and further charge enumerated and set forth in the schedule hereunder written: (a) And whereas the said Richard Farrall has up to the date of these presents made the several payments and subscriptions, and in all other respects complied with the rules of the said Building and Investment Society, and the terms of the proviso for redemption in the indenture firstly mentioned and set forth in the said schedule hereunder written contained, and the sum of 335*l.*, or thereabouts, only now remains due and owing to the trustees of the Burslem and Tunstall Permanent Fifty Pounds Benefit Building and Investment Society upon or by virtue of the several mortgage securities enumerated in the said schedule hereunder written: And whereas, the principal sum of 100*l.* is still due to Mr. John Buckley upon the mortgage security in his favour particularized in the said schedule, but all interest thereon has been duly discharged: And whereas the said Richard Farrall now stands justly indebted to the said Charles Hilditch in the sum of 100*l.* for goods sold and delivered to the said Richard Farrall, which the said Richard Farrall doth hereby admit and *acknowledge: And whereas the [*844 said Charles Hilditch having recently commenced an action against the said Richard Farrall for the recovery of the said sum of 100*l.* so due to him as aforesaid, and he the said Richard Farrall being desirous of staying such action and of securing unto the said Charles Hilditch the payment of the said sum of 100*l.* sought to be recovered by such action, hath proposed and agreed to convey and assure the said hereditaments and premises, subject to the said several encumbrances thereon mentioned in the said schedule, unto the said Charles Hilditch and his heirs, upon the trusts hereinafter mentioned for securing the said debt or sum of 100*l.* so due to the said Charles Hilditch; and it has also been agreed between the said Richard Farrall and Charles Hilditch that he the said Charles Hilditch shall be at liberty to sign judgment in the said action so commenced against the said Richard Farrall as aforesaid, but that no execution shall issue thereon until this present security be realized: Now, this indenture witnesseth, that, in pursuance of the said recited agreements, and in consideration of the sum of 100*l.* so due from the said Richard Farrall to the said Charles Hilditch as aforesaid, he the

(a) The schedule referred to contained only the following: "7th May, 1852. Indentures of mortgage made between George Hargreaves of the first part, and the several other persons therein named, trustees of the Burslem and Tunstall Permanent 50*l.* Benefit Building Society, of the second part."

said Richard Farrall doth by these presents grant, release, and convey unto the said Charles Hilditch and to his heirs all that messuage, tenement, or dwelling-house, with the buildings, shop, bakehouse, out-buildings, yard, land, and all other the premises thereto belonging and adjoining, situate at Kidsgrove, in the parish of Wolstanton, in the county of Stafford, as the same are now in the occupation of the said Richard Farrall, his under-tenants or assigns, and which said messuage or dwelling-house was heretofore erected by one George Hargreaves on a plot of land which formerly formed part of a certain farm and lands called Harding's Wood Farm, and containing by admeasurement, including *845] the site of the buildings, 350 square yards, or thereabouts, more or less; together with all houses, outhouses, buildings, rights, members, and appurtenances whatsoever to the same belonging; and all the estate, right, title, and interest, both legal and equitable, of him the said Richard Farrall therein and thereto; To have and to hold the said messuages, tenement, or dwelling-house, shop, buildings, and all and singular other the hereditaments hereinbefore described, and hereby conveyed and assured, with their and every of their appurtenances, unto the said Charles Hilditch and his heirs, to the use of the said Charles Hilditch, his heirs and assigns for ever; subject, nevertheless, to the several indentures of mortgage and further charge enumerated and set forth in the schedule hereunder written, the provisos for redemption therein respectively contained, and the trusts, powers, and provisions hereinafter contained; that is to say, upon trust that he the said Charles Hilditch, his heirs, executors, administrators, or assigns, do and shall forthwith enter into the possession or receipt of the rents and profits of, and with all convenient speed absolutely sell and dispose of, the said messuage or tenement, hereditaments, and premises, by public auction or private contract, either together or in parcels, at such price or prices as to him or them shall seem reasonable, and subject or not subject to any special or other conditions or stipulations relative to the title, or evidence of title, or otherwise, with liberty to buy in the said hereditaments and premises, or any part thereof, and to resell the same at any future sale or sales, without being responsible for any loss that may be incurred thereby; and also with full power for him or them to rescind and annul or alter the terms, conditions, and stipulations of any contract which may be entered into respecting the sale of the said heredita- *846] ments, or any part thereof, without being answerable for any loss sustained in consequence; and also with full power to convey and assure the said hereditaments and premises when sold to the purchaser or purchasers of the said hereditaments, and to give receipts to such purchaser or purchasers under the power of sale hereinbefore contained, which shall effectually exonerate such purchasers or purchaser taking the same from all responsibility with respect to the application of the purchase-moneys therein expressed to be received: And it is hereby, further declared that the said Charles Hilditch, his heirs, executors, administrators, or assigns, shall stand possessed of the moneys to arise from the sale or sales of all or any part of the said messuage, tenement, or dwelling-house, hereditaments, and premises herein directed to be sold as aforesaid, and the rents and profits henceforth arising therefrom until the same shall be sold (and which rents and profits may be received under or by virtue of these presents without prejudice to the

exercise of the aforesaid trusts for sale), Upon and for the trusts, intents, and purposes following, that is to say, in the first place, to discharge all such costs, charges, and expenses attending the said action, the preparation and execution of the presents, and also of any such sale or sales as aforesaid, or the receipt and recovery of the said rents and profits, or otherwise, to be incurred in the execution of the trusts hereby declared; and, in the second place, to pay and satisfy thereout all principal moneys and interest that may be then due or owing upon the said several indentures of mortgage and further charge mentioned in the said schedule hereunder written, to or in favour of the said Benefit Building and Investment Society, and the said John Buckley, as aforesaid (together with all costs and expenses, if any, attending the non-payment of the same respectively); *and, subject thereto, do [*847 and shall retain and pay himself and themselves the said sum of 100*l.* so due as aforesaid, together with interest thereon at the rate of 5*l.* per cent. per annum; and then upon trust to pay over the surplus, if any, unto the said Richard Farrall, his executors, administrators, or assigns: And the said Richard Farrall doth hereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree with and to the said Charles Hilditch, his executors and administrators, that he the said Richard Farrall, his executors, administrators, or assigns, or some or one of them, shall and will forthwith well and truly pay or cause to be paid unto the said Charles Hilditch, his executors or administrators, the sum of 100*l.*, with interest for the same at the rate of 5*l.* per cent. per annum; and also that he the said Richard Farrall, subject as aforesaid, now hath in himself good right, full power, and lawful and absolute authority to grant and release the said hereditaments and premises unto and to the use of the said Charles Hilditch, his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; and, further, that, subject as aforesaid, the said hereditaments and premises shall be held and enjoyed according to the limitations and provisions hereinbefore contained, without any let, suit, eviction, ejection, denial, or disturbance of or by the said Richard Farrall, his heirs, executors, or administrators; and at his and their own costs well and sufficiently protected, saved harmless, and kept indemnified of, from, and against all former and other estates, rights, titles, liens, charges, and encumbrances whatsoever, except as appears by these presents: And moreover that the said Richard Farrall and all persons rightfully claiming any estate or interest, legal or equitable, in the said hereditaments and premises (except persons claiming in respect of the *said prior encumbrances), shall and will from time to time and [*848 at all times hereafter, at the request of the said Charles Hilditch, his heirs, executors, administrators, and assigns, but at the costs of the said Richard Farrall, his heirs or assigns, execute and perfect all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the better, more perfectly or satisfactorily granting, releasing, confirming, or otherwise assuring the said hereditaments and premises hereby granted and conveyed, unto and to the use of the said Charles Hilditch, his heirs and assigns, according to the true intent and meaning of these presents, as the said Charles Hilditch, his heirs, executors, administrators, or assigns, or his or their counsel in the law, shall require: And lastly, the said Charles Hilditch,

at the doth hereby attorn and become tenant of the said hereditaments and premises hereby conveyed, to the said Charles Hilditch, at the yearly rent of 20*l.* per annum, to be paid by two equal half-yearly payments, on the 29th day of September and the 25th day of March in every year. In witness," &c.

The defendant proposed to show, on cross-examination of the plaintiff, that the recital therein that no execution should issue upon the judgment signed against the plaintiff, until that security had been realized, had been inserted in the deed by mistake and without the knowledge or consent of the defendant, and that he had executed it without reading it. This evidence, however, was rejected.

It was then submitted that the recital did not amount to a covenant, but was merely evidence of an agreement.

The learned judge, however, overruled the objection, and directed a verdict to be entered for the plaintiff, leave being reserved to the
 *849] defendant to move to enter *a verdict for him if the court should be of opinion that the recital in question did not constitute a covenant.

Huddleston, Q. C., in Michaelmas Term last, accordingly obtained a rule nisi on the point reserved, and also for a new trial, on the ground that the learned judge-improperly rejected the evidence to show that there was no such agreement as recited in the deed, and that the recital was inserted by mistake. He submitted, that, if the plaintiff relied on the estoppel arising from the defendant's execution of the deed, he should have replied it; and that, not having done so, the matter was thrown at large. He referred to *Thoroughgood's Case*, 2 Co. Rep. 5, *Vooght v. Winch*, 2 B. & Ald. 662, *Magrath v. Hardy*, 4 N. C. 782 (E. C. L. R. vol. 33), 6 Scott 627, *Bowman v. Taylor*, 2 Ad. & E. 278 (E. C. L. R. vol. 29), 4 N. & M. 264 (E. C. L. R. vol. 30), *Bowman v. Rostron*, 2 Ad. & E. 295, 4 N. & M. 551, *Carpenter v. Buller*, 8 M. & W. 209,† and *Lord Feversham v. Emerson*, 11 Exch. 385,† and to the notes in *Wms. Saund.* 325 a, and to *Trevivan v. Lawrence and The Duchess of Kingston's case*, in 2 *Smith's Leading Cases*, 605 et seq.

Pigott, Serjt., and *Phipson*, showed cause.—The question is whether the recital of the agreement that no execution should issue upon the judgment until the security should have been realized, operates as a covenant. It is submitted that it does. In *Comyns's Digest, Covenant* (A. 2), it is said that "any words in a deed which show an agreement to do a thing make a covenant; as, if it be agreed by articles between A. and B. that stock shall be in the hands of B. until a jointure be made, B. solvendo proinde the interest to A.; covenant lies against B. for the interest. In *Courtney v. Taylor*, 7 Scott N. R. 749, 6 M. & G.
 *850] 851, *Tindal, C. J.*, says: "I entirely agree that it is not *necessary, in order to charge a party with a covenant, that there should be express words of covenant or agreement, but that it is enough if the intention of the parties to create a covenant be apparent." And *Maule, J.*, says: "Where a party unequivocally admits (in a deed) himself to be liable to pay money, a covenant that he will pay it may be implied." It is enough if it shows a clear intention that the thing shall or shall not be done: *Aspdin v. Austin*, 5 Q. B. 671 (E. C. L. R. vol. 48), *D. & Meriv.* 515; *Dunn v. Sayles*, 5 Q. B. 685, *D. & M.* 579. In giving the judgment of the court in the former of these cases, Lord

Denman says: "Where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instrument had contained express covenants to perform them." So, in *Platt on Covenants* 33, it is said: "Words of recital may, when joined and considered with the rest of the instrument, be the foundation of an action of covenant." As to the evidence, the learned judge was clearly warranted in rejecting it. It was not competent to the defendant by parol evidence to vary or contradict the terms of the deed.

Huddleston, Q. C., and *Gray*, in support of the rule.—It may be conceded that no particular form of words is necessary to constitute a covenant, where the intention to make a covenant clearly appears. In *Co. Litt.* 352 b, it is said that a recital doth not conclude, "because it is no direct affirmation." The recital in question has no reference whatever to the subject-matter of the deed in which it is found: and it may well rest on the parol agreement. The mere fact of its being found in an instrument under seal does not make it a covenant: it is a mere recital of a past agreement. **[CROWDER, J.—Suppose it had been introduced thus,—“And whereas it is agreed,” &c., [*851 would that be a covenant?]* It might. *[WILLIAMS, J.—My Brother Byles has just handed me a case which seems to hit the very point, viz., Barfoot v. Freswell, 3 Keble 465, which is as follows:—“In covenant against two on demise of a coal-mine by two, except the fourth part, whereby its recited that before sealing of the indenture it was agreed on consideration that the plaintiff should have the third part of the coals digged. On demurrer to the declaration, Wild excepted that here is no covenant to pay the third part, but a recital of agreement to have it. But, by Hales, C. J., were it but a recital that before the indenture they were agreed, it is a covenant; and so, to say whereas it was agreed to pay 20*l.*, for now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act in pays, when its declared by deed, its now a covenant by the indenture.” That is exactly in point; though Keble is not generally esteemed a first-rate authority.]* There the recital has reference to the very subject-matter of the deed; and in that respect the case resembles *Rigby v. The Great Western Railway Company*, 14 M. & W. 811:† here it is altogether collateral. Suppose this deed had contained a recital that the defendant was indebted to the plaintiff in 100*l.* on a promissory note,—would that have amounted to a covenant to pay it? *[BYLES, J.—In Severn and Clerk’s Case, 1 Leon. 122, “the case was, that A. by his deed-poll recited that whereas he was possessed of certain lands for years of a certain term; by good and lawful conveyance, he assigned the same to J. S., with divers covenants, articles, and agreements in the said deed contained, which are or ought to be performed on his part. It was moved, if this recital (whereas he was) be an article or agreement within the meaning of the *condition of the said obligation, [*852 which was given to perform, &c. Gawdy conceived that it was an agreement; for, in such case I agree that I am possessed of it, for everything contained in the deed is an agreement, and not only that which I am bound to perform; as, if I recite by my deed that I am possessed of such an interest in certain land, and assign it over by the*

same deed, and thereby covenant to perform all agreements in the deed, if I be not possessed of such interest the covenant is broken. And it was moved, if that recital be within these words of the condition (which are or ought to be performed on my part). And some were of opinion that it is not within those words; for, that extends only in futurum, but this recital is of a thing past, or at the least present. Clench: Recital of itself is nothing: but, being joined and considered with the rest of the deed, it is material, as here, for against this recital he cannot say that he hath not anything in the term. And at the length it was clearly resolved, that, if the party had not that interest by a good and lawful conveyance, the obligation was forfeited."'] *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the court:—

In this case the question we propose to consider, is whether the recital in the deed set out in the declaration "Whereas, &c., it has been agreed between the said R. Farrall (the plaintiff) and C. Hilditch (the defendant) that he the said C. Hilditch shall be at liberty to sign judgment in the said action so commenced against the said R. Farrall as aforesaid, but that no execution shall issue thereon until the present security is *853] realized," amounts to a covenant by the defendant *not to issue execution until that period shall have arrived.

In the course of the argument, a case of Barfoot v. Freswell was cited from 3 Keble 465, which, if faithfully reported, appears to be very much to the point. In that case, in covenant against two on a demise of a coal-mine by two, except the fourth part, whereby it was recited, that, before the sealing of the indenture, it was agreed, on consideration, that the plaintiff should have a third part of the coals digged, on demurrer to the declaration it was excepted that there is no covenant to pay the third part, but a recital of an agreement to have it. But, by Hale, C. J., "were it but a recital that before the covenant they were agreed, it is a covenant; and so, to say 'whereas it was agreed to pay 20l.;' for, now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act in pays, when it is declared by deed it is now a covenant by indenture:" and judgment was given for the plaintiff.

It must, however, be admitted that Keble is of no high repute as an accurate reporter: and the court would be slow to act on a case in that book, if it were unsupported by others.

There are several authorities that a recital in a deed may amount to a covenant. Thus, in *Severn v. Clerk*, 1 Leon. 122, it was held, that, where A. by his deed-poll, after reciting that he was possessed of certain lands for years of a certain term, assigned the same to S. G., with divers covenants, articles, and agreements in the said deed contained, it was held that this recital (whereas he was, &c.) amounted to an agreement within the meaning of the condition of the obligation, which was to perform all agreements in the deed. (See also *Johnson v. Procter*, *854] *Yelv.* 175, and the remarks of Lord *Eldon on that case, in his judgment in *Browning v. Wright*, 2 B. & P. 25). So, in *Holles v. Carr*, 2 Swanst. 638, 2 Mod. 86, Lord Chancellor Nottingham held (contrary to the opinion of Wilde, J., and Wyndham, J., whom he had called to his assistance), that, where both parties to a deed recite "whereas it is intended a fine shall be levied," this declared an agreement to levy, and that every agreement under seal amounts to a covenant on

which an action lies. We may also mention, that, in *Adams v. Gibney*, 6 Bingh. 656 (E. C. L. R. vol. 19), 4 M. & P. 491, although the citation of the case in Keble drew forth a strong remark from Park, J., yet the considered judgment of the court seems to take it for granted that a recital *may* amount to a covenant.

On the other hand, it is plain that the court ought to be cautious in spelling a covenant out of a recital of a deed; because that is not the part of a deed in which covenants are usually expressed. The proper office of a recital, said Lord Mansfield in *Moore v. Magrath*, Cowp. 9, like that of a preamble of an act of parliament, is, to serve as a key to what comes afterwards.

But, in the present case, we think it sufficiently appears by the whole deed that it was intended to express *thereby* the whole arrangement and transaction, and to ratify it under the seals of both parties. It is mentioned that the now defendant has commenced an action to recover the debt of 100*l.*, and that the now plaintiff is desirous of staying such action, and of securing the payment. And this is followed by a distinct and unqualified statement of an agreement that the execution should be stayed. If the recital had been that it has been [*and is*] agreed, this would surely have been a covenant to that effect. And it seems to us that the intention which [*and is*] would have expressed, does sufficiently appear by the words *used, when construed with reference to the [*855 subject-matter.

It must be added, that the fact relied on, and which it was proposed by the defendant to put in evidence, viz. that *no* such agreement existed independently of the deed, appears to us a strong confirmation of the conclusion at which we arrive, that an agreement was intended to be constituted by the deed itself.

For these reasons, we are of opinion that this rule should be discharged: and the view we have taken of the case makes it unnecessary to consider the other question which arose on the argument, viz. whether the defendant was estopped from giving evidence that no such agreement had ever been made.

With respect to the authority of Keble, we cannot refrain from referring to the highly valuable and interesting work of Mr. J. W. Wallace, of Philadelphia, *The Reporters*, 3d edit. pp. 207, 208, from which it appears that more is to be said for the character of this reporter as a "tolerable historian of the law," than from the remarks made upon him from time to time might have been supposed. Rule discharged.

No set form of words is necessary to constitute a covenant, provided they clearly import an agreement, and are reduced to writing, under the hand and seal of the party. They may be contained in a recital, or be found in connection with an exception, or introduced by words of condition, or with a proviso. In all these cases, however, the intention to make an agreement must be very clearly manifested by the lan-

guage used, or by the whole face of the instrument taken together: *Whitehill v. Gotwalt*, 3 Penna. 327; *Marshall v. Craig*, 1 Bibb 379; *Hallett v. Wylie*, 3 Johns. 44; *Bull v. Follett*, 5 Cowen 170; *Jackson v. Swart*, 20 Johns. 85; *Wright v. Tuttle*, 4 Day 321; *Mitchel v. Hazen*, 4 Conn. 508; *Randel v. Chesapeake and Delaware Canal Co.*, 1 Harr. Del. 233; *Cramer v. Bradshaw*, 10 Johns. 484; *Yocum v. Barnes*, 8 B.

Monr. 496; *Midgett v. Brooks*, 12 Ired. 145; *Greenwood v. Wilson*, 3 Foster 26; *Moale v. Baltimore*, 5 *Maryl.* 314. The implication of covenants for title in conveyances will not in general be made from mere recitals: *Whitehall v. Gotwalt*, 3 *Penna.* 327; *Ferguson v. Dent*, 8 *Missouri* 673; *Rawle on Covenants for Title*, 3d ed. 488, &c. See *Scott v. Fields*, 7 *Watts* 360, as to the effect of the recital in a mortgage of the debt which it is intended to secure.

***856] *MANNALL and Others v. FISHER and Another. Feb. 5.**

The corporation of Orford claiming the exclusive right of fishery in Orford Haven, their lessees brought an action against two fishermen for an invasion of that right.

The evidence offered on the part of the plaintiffs consisted of a charter of Queen Elizabeth, dated in 1569, confirming all former charters of the corporation, and giving them power to make by-laws for the preservation of the fish in the haven,—a statute of 27 *Eliz. c. 21*, for the preservation of Orford Haven, and a private act of 31 *Eliz. c. 1*, confirming the former act. in both of which mention was made of the interest of the corporation,—the record in an action brought by the corporation in 1792, against a fisherman for *dredging for oysters* in their water, in which the corporation succeeded in establishing their right to the *oysters*,—a book kept by the chamberlain of the corporation containing entries from 1792 downwards of various sums paid by inhabitants of Orford, as well as by strangers, for licenses to fish in the haven for “floating fish,”—and oral testimony showing that the corporation had from that period down to the present time claimed the exclusive right to the floating fish within the limits of the haven, and had on many occasions obstructed and prevented unlicensed persons from fishing therein:—

Held, that the jury were warranted in finding upon this evidence that the corporation had the right claimed; and that the plaintiffs’ case was not displaced by evidence on the other side that a great number of persons had constantly fished without licenses, though repeatedly warned off.

THIS was an action by the plaintiffs, lessees of the corporation of Orford, in the county of Suffolk, against the defendants, two fishermen, for unlawfully fishing in their several fishery.

The first count of the declaration stated that the defendants, on divers days and times, broke and entered the several fishery of the plaintiffs in the river and water of Ore, in the county of Suffolk, and fished and trawled in the said fishery for fish, and chased and disturbed the fish therein, and caught, took, and carried away, and converted to their own use divers quantities of the plaintiffs’ fish therein.

The second count stated that the defendants, on divers days and times, broke and entered the several fishery of the plaintiffs in the river and water and county aforesaid, and in that portion of the said river and water called “the Middle Gull,” and fished and trawled in the said fishery for fish, and chased and disturbed the fish therein, and caught, took, and carried away, and converted to their own use divers quantities of the plaintiffs’ fish therein.

The third count charged similar acts committed in that portion of the said river and water called “the *Lower Gull;” and the fourth

***857]** in that portion of the said river and water called “the Gull.”

The fifth count alleged that the defendants converted to their own use divers quantities of the plaintiffs’ goods, to wit, live fish and dead fish.

The defendants pleaded,—first, to the whole declaration, not guilty. Secondly, to the first, second, third, and fourth counts, that the seve-

ral alleged fisheries in which, &c., at the said several times when, &c. were, and still are, and from time immemorial have been, part and parcel of the said river and water called Ore, and that the said several parts of the said river and water in which, &c., now are, and at the several times when, &c., were, and from time whereof the memory of man is not to the contrary have been, a public and common navigable river, in which the tides and waters of the sea during all the times aforesaid have flowed and re-flowed; and that, in the said parts of the same river and water in which, &c., every subject of this realm, at the said several times when, &c., of right had, and of right ought to have had, and still hath, and of right ought to have, the liberty and privilege of fishing; wherefore the said defendants, being subjects of this realm, at the said several times when, &c., entered into the said fisheries in which, &c., so being parts of the said navigable river as aforesaid, where the said waters of the sea flow, to fish in the said river there, at the said several times when, &c., being reasonable times of the year for such fishing, and at those several times did fish and trawl for fish there, and chase and disturb the fish therein, and the said fish in the said first second, third, and fourth counts mentioned there found and being, caught and took and carried away and converted to their own use, as it was lawful for them to do for the cause aforesaid.

*Thirdly, to the fifth count, that the said goods in the said fifth count mentioned were not the plaintiffs' as alleged. [*858

The plaintiffs joined issue on the first and third pleas, and took issue on the second plea: and, for further replication to the second plea, they said, that the town of Orford, in the county of Suffolk, is, and from time whereof the memory of man is not to the contrary hath been, an ancient town, and that the inhabitants of the said town are, and from time whereof the memory of man is not to the contrary have been, a body corporate and politic in deed, fact, and name, and have at various times for and during the time aforesaid until the 7th day of July in the 21st year of the reign of the Lady Elizabeth, late Queen of England, been called and known by various names of incorporation, to wit, by the name of The Honest Men of Oreford, and also by the name of The Burgesses of the town of Oreford, and since and after the last-mentioned day by the name of The Mayor and Commonalty of the Borough of Orford; that the said body politic and corporate, from time whereof the memory of man is not to the contrary, until and at the said several times when, &c., have had and enjoyed, and have used and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, for themselves and their farmers, tenants, and lessees thereof, the several and exclusive right, liberty, and privilege of fishing for and catching and taking and carrying away all fish in and upon the said places and fisheries in which, &c., and were and still are seised of the said several fisheries in the declaration mentioned for an estate in fee-simple, to them and their successors, and had and were entitled in law to the said several fisheries for the said estate in fee; and, being so entitled and seised, the *said body corporate [*859 and politic, before the committing of the acts complained of, by an indenture made between them of the one part, and the plaintiffs and one William Field of the other part, and sealed with the common seal of the said body corporate and politic, did demise, grant, and lease unto

the plaintiffs and the said William Field the said several fisheries, with the appurtenances thereunto belonging, and the sole profit and benefit of the same, and also full power and authority to have, take, and dispose of to their own use and uses all oysters and other fish whatsoever within the said fisheries, to have and to hold the same to the plaintiffs and the said William Field, except as therein is excepted, from the 31st day of March, 1851, for the term of ten years next ensuing, and fully to be complete and ended, at a certain yearly rent therein mentioned; by virtue of which said demise the plaintiffs and the said William Field entered into and upon the said several fisheries, and became and were, until and at the committing of the acts complained of, possessed thereof for the said term so to them granted as aforesaid. Issue thereon.

The cause was tried before Williams, J., at the last assizes for Suffolk. In support of the claim of the corporation of Orford to the exclusive right of fishery in the places named in the declaration, the plaintiffs put in a charter of Queen Elizabeth of the date of 1569, whereby all former charters were confirmed, and power given to the corporation of Orford to make by-laws for the preservation of the fish in the haven of Orford; and also an act of the 27 Eliz. c. 21, by which it was provided that "it shall not be lawful to any person to set any net with any boat called a stallboat, or other boat or vessel whatsoever, within the entry or mouth of Orford Haven, in the county of Suffolk, or in the Gull, being a branch *860] of the said haven, except the *mask or shale of every such net throughout the whole do contain two inches and a half at the least in the wideness from knot to knot, upon pain to forfeit the net so set, or the value thereof, and 5*l.* to the Queen and the informer," &c.; and also a private act of 31 Eliz. c. 1, "for the preservation of the haven of Orford." The lease from the corporation to the plaintiffs was then put in, dated in March, 1851; and also certain by-laws made by the corporation on the 4th of October, 1790, prohibiting all persons from fishing in the Ore without license under the corporation seal.

The chamberlain of the corporation of Orford produced a book from which were read some entries in the handwriting of a former chamberlain, from 1791 downwards, of sums received at various times for licenses to fish for "floating fish:" and he stated that he had been in the habit of granting such licenses as well to inhabitants of Orford as to "out-setters," or persons residing elsewhere, viz. at Harwich and Aldborough; but that the latter were charged double the sum charged to the former,—generally 10*s.* each.

One of the water-bailiffs of the corporation was also called, to prove that he had for many years been employed to prevent unlicensed persons from fishing in the haven, and that he had repeatedly warned them off, and on some occasions had seized their nets.

The record in an action by the corporation of Orford against one Tabor, tried before Ashhurst, J., at the Bury assizes in 1792, in which the exclusive right of the corporation to the oysters was after much litigation established, was also put in.

On the part of the defendants reference was made to the 13 Edw. 1, c. 47, which is found in Barrington's Observations on Statutes, p. 128, and is as follows:—"Provisum est quod aque de Humbre, Ouse, Trente, *861] Doon, Eyre, Dervent, Werf, Nid, Yore, Swale, Teese, *et omnes alie aque in quibus salmones capiuntur in regno, ponantur in

defenso quod salmones capiendos a die Nativitatis Beate Marie, usque ad diem Sancti Martini, et similiter quod salmoneti non capiantur nec destruantur per retia vel per aliqua ingenia, a medio Aprilis usque ad Nativitatem Beate Joannis Baptiste;" and examined copies, from the parliament roll, of two acts of 4 H. 7, c. 21, and 7 H. 7, c. 9, relating to the Orford fishery, were put in and read. They ran as follows:—

"The act for the preservation of the frye of fyshe.

"To the King, our sovereign Lord.

"Prayen your comyns in this present parlement assembled, that where divers statutes and ordenaunces for saving and keping of frye and broode of fish in fresh ryvers of this realme before this time have been made and ordeigned, but for savyng and keeping of frye and brood of fissh resorting oute of the see and salt waters into havens and creekys within the seid realme, any ordenaunce generall hath not been purveied ne made, hou be it it were full requisite and profitable to all the comyns of this your realme, and specially to your subjecttis and inhabitautes nygh adjoyning to the nasse and haven of Orford, in the countie of Suff., within whiche nasse and haven there is yerely grete multitude of spawn and brood of all manner of fisshes of the see, and there wold largely increace multiplie if they myght there convenient tyme be suffered to abide: But nowe it is so that in late dayes for a singuler covetise and lucre in taking of a fewe grete fisshes, certeyn persones have used to sette and ordeyn certeyn botes callid stall boetes fastened with ankers, havying with theym suche manner of unresonable nettes and ingynes, that all manner frie and brood of fissh in the seid haven multiplied is taken and destroyed, as well grete fisshes unseasonable as the seid frie and brood to *nombre innumerable, with the which frie and brood the seid persones with parte thereof fede [*862 their hogges and the residue they put and ley it in grete pittes in the grounde, whiche ellis wold turn to such perilous infeccion of eire that no person thidre resorting shuld it abide or suffre; to the great hurte of all your liege people within this your realme, and specially to your subgiettis and inhabitautes within the shires of Norff. and Suff., and also causeth great scarsite of fissh in that contris where afore this tyme was wont to be grete plente: Wherefor please it your moste noble grace by thadvyse and assent of the lordes spirituall and temporall in this present parlement assembled, and by auctorite of the same, to ordeigne, stablish, and enacte that all such stall boetes, nettes, and ingynes aforesaid, from the first day of Apryll that shalbe in the yere of our Lord Mccccclxxxx be not occupied ner used for the destroyeng or takyng of eny frie or brood of fissh within the haven or nasse aforesaid, upon payn of forfeiture of x. li. at every tyme that any persone shall happen to do contrarie to this ordenaunce, the oon half thereof to be to your Highnes, and the oder half to him that shall happen to fynde the said forfeiture and shewe the same by informacion in to your Eschequer there to be determined aftir the cours of the same court. And ov. that be it ordeyned by thauctorite aforesaid, that the justices of peas of the shires of Norff. and Suff. for the tyme beyng have auctoritie and power to inquire in their several sessions of all the botes, nettes, and engynes used or occupied contrary to this ordenaunce aforesayed, and the offenders therein befor theym presented to punyshe as by their discre-

cion shall be thought lawfull and resonable: This acte and ordenaunce to endure unto the begynnyng of the nexte parliament."

"An act of parliament inrolled anno septimi Henrici Septimi.

*863] *Prayen the comens in this present parliament assembled, that where within the nasse and haven of Orford, in the countie of Suffolk, there is yerely grete multitude of spawne and broode of all manner fysshes of the see which there shuld naturally and largely increas and multiplie if they myght by space and tyme convenient there be suffred to continue: And where in late dayes for a singular covetise and lucre in takyng of a fewe grete fysshes, certeyn persones have used to ordeyn and sette certeyn bootes called stallbootes festened with ankers havyngh with theym suche manner unfeull nettes and ingynges that as well grete habundaunce of all manner of frie and broode of divers kyndes of fische in the said haven multiplied as grete fisses unseasonable have be taken and destroyed, with whiche fisse and broode so taken the said persones with grete parte thereof have fedde their hogges, and the residue thereof they buried in grete pittes in the grounde in eschewing of grete infeccions of ayer, whiche hath of long tyme caused grette scarcite and bareynes of fisch in that countre, to the grete hurte and impoverysshing of your people whiche in tymes past had grete plente: Weerfor as well for the grete profite of your subgettis and inhabitauntes nygh adjoynnyng to the said nasse and havyn as for the grete profite and comforte of all your subgettis and inhabitauntes within the counties of Norff. and Suff. by authorite of your Parliament holden at Westm. the xiii day of Januarie, the iiiith yere of your most noble reign, yt was enacted, ordeyned, and establisshed by auctorite of the same Parliament, that all suche stallebotes nettes and ingynges aforeseid frome the first day of Aprill that was in the yere oure Lord God mccccxxxx shuld not be occupied nor used for the destroying or taking of any fyre or broode or fische within the haven or nasse aforeseyn uppon peyn of forfeiture *864] of x. li. at every tyme that any person shuld *happyn to do contrarie to that seyde ordenance, the one half thereof to be to your Highnes, and the oder half ty hym that shuld happyn to fynde the seyde forfeiture and shew the same in your Eschequer by informacion there to be determyned after the cours of the same court: And ov. that it was ordeyned by auctorite of your Parliament aforeseid that the justices of peas of the seid counties of Norff. and Suff. for the tyme being shuld have auctorite and power to inquire in their severall sessions of all the botes, nettes, and ingynges used and occupied contrarie to the seid ordenance, and the offenders therein before theym presented to punyssh as by their discrecions shuld be thought lawfull and resonable: And that the seid acte and ordenance shuld endure and take effect till the begynning of the next Parliament ensuyng, as by the same acte more pleynty apperith; by force of which acte and ordenance the seid stallebotes, nettes, and ingynges have be hidderto withdrawen and abated and grete plente of fysshe frye and broode of fysshe hath in this mane time gretly be multiplied and encreased, to the grete profite, comforte, and releef as well to the people of the seid counties of Norff. and Suff. as to the people of many oder contrees, as well apperith by opyn experience, and yet more largely shall encrease by fyrdyr continuance: And forasmoch as the said acte of parliament was ordeyned no fyrdyr to stand in effect then to the first day of this present parliament, Pleas it therefore your

Most Noble Grace by thadvyce and assent of the Lords spirituall and temporall in this present Parliament assemblid, and by auctorite of the same, in consideracion of the premysses, to ordeyn, establissh, and enacte that the seid acte and ordenance in the seid last Parliament made and ordeyned may alwey stand, contynewe, and endure in perfite strenght and effecte.

“ Respons. Le Roy le vuelt.”

*A great number of witnesses were called on the part of the defendants, who proved that they had for many years (as far back as living memory could go) fished in the Ore without licenses, and for the most part without interruption. [*865]

It was contended on the part of the defendants, that the right to fish in a navigable river or arm of the sea, as this was, was a right in all the Queen's subjects; that this common law right was not to be defeated without the clearest evidence of an exclusive right in some individual or corporation; and that the evidence here offered was insufficient for that purpose.

For the plaintiffs it was insisted, that the charter of Queen Elizabeth was a sufficient recognition of the right claimed on the part of the corporation; that the right of the corporation to the exclusive dredging for oysters formally recognised and established on the trial before Ashhurst, J., in 1792 was strongly corroborative of the plaintiffs' right; (a) and that the charter of Queen Elizabeth made no distinction between the exclusive right to oysters and to floating fish.

The learned judge, in summing up, observed that the record of the trial in 1792 did not advance the plaintiffs' case, inasmuch as the contest there was confined to the right to oysters, which was not disputed upon the present occasion, and that it might very well be that the corporation had that limited right, and yet not the right now claimed. And he left the case to the jury upon the balance of testimony on the one side and on the other.

The jury returned a verdict for the plaintiffs, with nominal damages.

**O'Malley*, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence; Williams, J., observing, that, although he could not say that he was dissatisfied with the verdict, yet he thought that, upon the whole, it was a case in which the court should form their own opinion. [*866]

Power, Q. C., and *H. Mills*, now showed cause.—There was abundant evidence to justify the verdict. It was proved, that the corporation, having in 1792 established their right to the oysters,—which was by far the most valuable part of the right,—proceeded to grant licenses for dredging and fishing for floating fish within the limits of their waters, and that none had been without interruption since allowed to fish there unless licensed. [WILLIAMS, J.—You certainly proved no acts of ownership anterior to the date at which the right of the corporation to the oysters was established. I must say I should not have been dissatisfied with a verdict either way.] The question was peculiarly one for the jury: and, unless the court can see that there has been some misapprehension or miscarriage, they will not interfere.

(a) See the *Mayor and Commonalty of Orford v. Richardson*, 4 T. R. 437; *Richardson v. The Mayor and Commonalty of Orford*, 2 H. Bl. 182, 2 Anstr. 231.

O'Malley, Q. C., and *Couch*, in support of the rule.—There was undoubtedly a great deal of evidence on both sides: but an important right like this ought not to rest solely upon the loose testimony of witnesses as to acts of ownership, which might be usurpation. If the right existed, it would be but reasonable to look for some evidence of it in the charters of the corporation. There is, however, none: and the act of 4 H. 7, c. 21, which passed upon the petition of the inhabitants of Orford, deals with the right, and yet makes no mention whatever of the corporation.

*867] The charter of *Elizabeth*, indeed, which empowers the corporation to make by-laws for the regulation of the fishing, is inconsistent with the ownership of the fishery being in them; for, if it were, they would not need such authority. In a case of this sort, the strong presumption of law is in favour of the rights of the public; and the evidence to overcome it should be beyond question. The absence of all documentary evidence in support of the claim affords a powerful argument against its validity. In *Warren v. Mathews*, 6 Mod. 73, it is laid down that "every subject of common right may fish with lawful nets, &c., in a *navigable river*, as well as in the sea;(a) and the King's grant cannot bar them thereof; but the Crown only has a right to Royal fish, and that the King only may grant." In *Williams v. Wilcox*, 8 Ad. & E. 314 (E. C. L. R. vol. 35), 3 N. & P. 606, in order to show the antiquity of a weir appurtenant to a fishery, in a navigable river (the Severn), the evidence consisted of an extract from Domesday Book, in which the fishery was mentioned,—an extract from the chartulary of Haghmon Abbey, containing copies of the grants of the fishery to the church, and of a way to the fishery, the earliest of which appeared to have been made in 1172–3,—and a judgment of M. T., 6 H. 6, in a cause wherein the Abbot of Haghmon was indicted for obstructing the navigation of the Severn, and pleaded an immemorial right of taking fish in the river, that the navigation was not obstructed, and that the weir was not made since the 3 Edw. 1, all which was found in his favour. In *The Mayor* *868] of *Colchester v. Brooke*, 7 Q. B. 339, the plaintiffs' claim was *founded upon a series of charters of Richard 1, Henry 3, Edward 2, Edward 3, Richard 2, and Edward 4, and of acts of user down to the time of the commencement of the action. In *Rogers v. Allen*, 1 Campb. 310, to prove a prescriptive right to a fishery as appurtenant to a manor, an *inquisitio post mortem* and seven other ancient documents from the Tower of London were put in to show that in very early times there had been a fishery at the mouth of the Burnham river held by the ancestors of the family in possession as parcel of the manor of Burnham; and also three judgments which had been obtained in the reigns of Charles 1, and Charles 2, by the lords of the manor of Burnham, in actions for breaking and entering their several fishery in the Burnham river; and also certain licenses, which appeared on the court-rolls of the manor, and bore date from the year 1661 downwards to the end of the seventeenth century, whereby the lords of the manor, in consideration of certain rents, had granted the liberty of fishing and dredging for oysters in their several fishery in the Burnham river, reserving to themselves the exclusive right to all floating fish therein: and evidence of

(a) See *Lord Fitzwalter's Case*, 1 Mod. 106, 2 Lev. 139, *Carter v. Mureot*, 4 Burr. 2163, *Seymour v. Courtneay*, 5 Burr. 2814, *Mayor of Lynn v. Turner*, Cowp. 16, *The Mayor of Orford v. Richardson*, 4 T. R. 437: but see the judgment in the case reversed, 2 H. Bl. 182, 2 Anstr. 231.

the same character as the evidence offered in this case was held sufficient to negative the prescriptive right claimed as to the floating fish, though not as to the oysters or ground fish. The same sort of documentary evidence as was given in the above cases was also given in *Jenkins v. Harvey*, 1 C. M. & R. 877,† 2 C. M. & R. 833,† and in *The Duke of Beaufort v. The Mayor, &c., of Swansea*, 3 Exch. 514,† and *Calmady v. Rowe*, 6 C. B. 861 (E. C. L. R. vol. 60). [WILLES, J., referred to *Benest v. Pipon*, 1 Knapp's P. C. Cas. 60, where it was held that repeated attempts to exercise the right of taking sea-weed from the rocks between high and low-water mark off the island of Jersey, afforded no evidence of the existence of such right.] The plaintiffs *ought to have given some evidence of a grant from the Crown, or some [*86 documentary evidence to show the antiquity of the exclusive right they claimed for the corporation of Orford. None such was produced. The plaintiffs contented themselves with putting in the record in the action against Tabor in 1792, in which the right of the corporation to oyster-beds in the haven was established. Founding themselves upon that verdict, the corporation seem gradually to have set up a claim to the floating fish also. The evidence on that part of the case was as strong on the one side as on the other: and, upon a mere balance of evidence, it is submitted the general right ought to prevail.

CROWDER, J.—I am of opinion that this rule should be discharged. The question, which was one of some importance, appears to have been tried at very great length. Many witnesses were called and documents put in on the part of the plaintiffs, and two statutes of 27 Eliz. c. 21, and 31 Eliz. c. 1, were relied on. The defendants, on the other hand, relied on other statutes of 13 Ed. 1, c. 47, and of 4 H. 7, c. 21, and 7 H. 7, c. 9. But I do not think these afford any great support to the arguments on either side. The main agitation of this question seems to have arisen since the year 1792. On the one side, there was a very strong body of evidence to show that the corporation of Orford had for that long period exercised control over the fishing by granting licenses to fish as well to their own people as to strangers, and had set persons to watch so as to prevent unlicensed persons from encroaching on the right, seizing nets, and imposing fines upon persons caught trespassing. All this was evidence from which the jury might conclude that the right of fishing claimed by the plaintiffs did exist. On the other hand, many instances were proved of persons, as well inhabitants *of Orford [*870 as strangers, fishing and claiming to exercise the general right to fish in all parts of Orford Haven, so as to invade the supposed exclusive right of the corporation. There was this positive conflict of testimony on the one side and on the other: and it is impossible to reconcile it. But it does not appear to me to present that sort of conflict suggested by the defendants' counsel, viz., that of two conflicting and opposing rights openly set up. It was insisted that the fact of the licenses to take floating fish not being shown to have been granted until after the year 1792 afforded strong evidence of usurpation on the part of the corporation; and that, if the exclusive right to the floating fish had been in the corporation, they would have set it up when their right to the oysters was in agitation. But I do not think that is a fair inference from that case. The complaint against the defendant there was for invading the rights of the corporation by dredging for oysters. It was

unnecessary for the plaintiffs to set up any right beyond the right to the oysters: the fact, therefore, of their omitting to set up the more extensive right cannot afford any legitimate inference against the existence of the right now claimed. What caused the corporation to issue the fishing licenses is mere matter of conjecture. Having been successful in resisting an invasion of their right to the oysters, it was reasonable that they should seek to establish some system to check encroachments on their right to the floating fish. From 1792 to the present time, these licenses appear to have been openly and continuously granted. The fact of their being granted was known to all, outsetters, as they are called, as well as inhabitants of Orford; and no action seems to have been brought or proceeding taken to resist the usurpation, if usurpation it were. The inhabitants were made to pay 5s. for their licenses, *871] strangers 10s., and in one instance as much as *a guinea. There was a strong body of evidence: there was some conflict: but, upon the whole, especially as the learned judge who tried the cause does not express any dissatisfaction with the conclusion the jury came to, I do not think we ought to interfere.

WILLES, J., concurred.

WILLIAMS, J.—The case on the part of the plaintiffs was certainly not a very strong one: but I do not think we should be acting right in interfering with the decision of the jury. The plaintiffs' case was certainly deficient in documentary evidence which one naturally looks for in a case of this sort. But, at the same time, the evidence of acts of ownership in the corporation for the last sixty years, by granting licenses, and obstructing and warning off persons who fished without being licensed, was very strong. On the other hand, the evidence offered on the part of the defendants was much of it of very little value; and some of the witnesses gave their evidence in a manner which probably induced the jury to withhold credit from them. Consistently with the ordinary rules which guide the courts in these cases, I think we ought not to disturb the verdict.

Rule discharged.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

REYNOLDS v. HARRIS. 1858, *Jan.* 27, 30; *June* 12.(a)

Upon a reference of all matters in difference in a cause, the costs to abide the event of the award, the party in whose favour the action is decided by the award is entitled to the costs of the cause, although some of the issues may be found in favour of the other party.

To one of several counts in an action of slander the defendant pleaded a multifarious plea of justification, setting forth a series of statements of facts, any one of which was a sufficient answer to such count. Upon a reference of the cause, the arbitrator found that one of such statements in the plea was true, and that the others were untrue. The finding on the issues as to another count was for the plaintiff, who had the general costs of the cause:—Held, that the finding on the part of such plea to be untrue was not a finding of an issue for the plaintiff within the 81st section of the Common Law Procedure Act, 1852, or of the rule Hil. Term, 2 Will. 4, r. 74, and that the plaintiff was, therefore, not entitled to the costs of the issue on such plea.

Held, further, that the defendant was entitled to the costs of so much of the plea as was found in his favour, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not to the costs of any evidence applicable only to that part of the plea which was found to be untrue.

The correctness of the decision in *Biddulph v. Chamberlayne*, 17 Q. B. 351 (E. C. L. R. vol. 79), questioned.

SLANDER.—The declaration contained four counts, but it is only necessary to mention the second count, which stated that before and at the time of the committing of the grievances thereafter mentioned, the plaintiff was carrying on the trade and business of a shipowner, broker for the sale of ships, ship insurance and general broker and seller of shares in ships; and that before this suit, whilst one Mr. Furnell was walking in the company of the plaintiff, the defendant, addressing the said Mr. Furnell, spoke the following slanderous words of and concerning the plaintiff, and of and concerning him in and in relation to his said trade and business, viz., “I,” meaning the defendant, “am sorry to see you, Furnell,” meaning the said Mr. Furnell, “walking in the company of a thief,” meaning the plaintiff,—the defendant meaning thereby that the plaintiff had been guilty of dishonesty, fraud, and cheating in and about and in relation to his said trade and business.

The defendant pleaded, first, not guilty to all the counts; and, secondly, to the second count, that while the plaintiff carried on the

trade and business therein mentioned, and before, &c., the plaintiff was employed in the way of his said trade and business to negotiate a charter-party of a ship called the *Orynthia*, belonging to Messrs. Bradley & Potts, of Sunderland, and which ship was accordingly chartered by the said Messrs. Bradley & Potts to a Mr. Goddard, through the agency of the plaintiff, in the way of his said trade or business; that before the committing of the said grievances the plaintiff was employed, in the way of his said trade and business, to arrange the terms upon which the said charter-party should be cancelled, and that the plaintiff accordingly, in the way of his said trade and business, arranged the said terms, and induced the said Messrs. Bradley & Potts to agree to pay, and the said Messrs. Bradley & Potts did pay, a large sum, to wit, 300*l.*, to the said Mr. Goddard as the price of the said cancelment, and thereupon the said charter-party was cancelled accordingly; whereas, in truth and in fact, the said Mr. Goddard was willing to accept, and did accept, a much smaller sum, to wit, 100*l.*, as the price of the said cancelment, as the plaintiff then well knew; and the plaintiff then, and before the committing of the said grievances, and while he so carried on the said trade and business, fraudulently, falsely, knowingly, and dishonestly represented to the said Messrs. Bradley & Potts that the whole amount agreed to be paid by them was the amount which the said Mr. Goddard was willing to accept for the said cancelment as aforesaid, and thereby cheated the said Messrs. Bradley & Potts out of the residue of the said money; that while the plaintiff carried on the said trade and business in the said second count mentioned, and before the committing of the grievances in the said second count mentioned, the plaintiff was employed in the way of his said trade and business by the said Mr. Goddard, to negotiate for him the purchase of a certain share in a ship called the *Baroness*, which ship belonged to the said Messrs. Bradley & Potts, and the plaintiff accordingly, in the way of his said trade and business, negotiated the said purchase at and for a certain sum, to wit, 1200*l.*, and the same was then sold by the said Messrs. Bradley & Potts at that price accordingly; and that the plaintiff, before the committing of the grievances, fraudulently, falsely, and dishonestly represented to the said Mr. Goddard that the sum which he had agreed, on behalf of the said Mr. Goddard, to give the said Messrs. Bradley & Potts for the sale of the said share as aforesaid was a much larger sum than that actually agreed upon as aforesaid, to wit, 1400*l.*, and thereby fraudulently and dishonestly induced the said Mr. Goddard to pay him such larger sum, and thereby cheated and defrauded the said Mr. Goddard out of the difference; that while the plaintiff carried on such trade or business as in that count mentioned, the plaintiff was employed, in the way of his said trade or business, by the defendant and the other part owners of a ship called the *Treasure*, to act as broker of the said ship, and it was then his duty, as such broker, to render accounts to the managing-owner of the said ship of the various disbursements made by the plaintiff, as such broker, on account of the said ship; and that while the plaintiff was so employed in the way of his said trade and business, and before the committing of the said grievances, the plaintiff knowingly, fraudulently, and dishonestly inserted in the accounts of the said ship so rendered by him as having been paid by him to different persons on account of the said ship, to wit, to Mr. J. Thomas, to Stephenson & Co., to Mr. Hastie, to Mr. Lee, to

Mr. Reynolds, to Mr. Surfas, to Mr. Loveland, to Mr. Mason, to Mr. M. Blake, to Mr. Trail, to Mr. Parnell, to Mr. Blythe, and to Mr. Frazer, much larger sums than the amounts actually and really paid, with intent to cheat and defraud the defendant and the other part owners of the said ship, and to cause the defendant and the other part owners to believe that the plaintiff had actually and really paid on account of the said ship the several sums of money inserted by him in the said accounts.

Issue was taken by the plaintiff on those pleas.

By the order of Willes, J., dated the 29th of August, 1856, and made by consent, all matters in difference in the cause were referred to the award of an arbitrator,—the costs of the cause and also the costs of the order and of the reference and award to abide the event of the award,—the arbitrator to find for the plaintiff or defendant respectively as he should think fit on each and every of the issues joined in the cause, and to have power to direct how the verdict in the cause should be entered, and also to direct what, if anything, should be done by either of the parties in reference to the subject-matter of the cause.

The arbitrator made his award as follows:—"Upon the first issue, on not guilty, I find for the plaintiff as to the second and fourth, and for the defendant as to the first and third counts of the declaration. Upon the second issue, arising out of a plea of justification to the second count, I find that so much of the plea as relates to the plaintiff and the accounts of the ship *Treasure* was proved, and that the rest of the plea was not proved. Being of opinion that the part proved is an answer to the count, I assess no damages for the plaintiff on that count. As to the fourth count, I assess the plaintiff's damages at 40s.; which sum I order the defendant to pay to the plaintiff or his attorney, Mr. Cooper, on demand. I do not think fit to exercise the power given me by the said order to direct anything to be done by either of the parties in reference to the subject-matter of the said cause."

On the taxation of the costs the Master disallowed the defendant's costs on the issue upon the plea of justification to the second count, because he considered that the evidence for the defendant, in support of that plea, applied as much to that part of it on which he failed as to that part on which he succeeded; and the Master allowed the plaintiff not only the general costs of the cause, but also the costs of the issue upon the said plea of justification.

Honyman (Jan. 27) moved for a rule to review the Master's taxation.—By the order of reference the costs are to abide the event of the award, that is, the event of the whole award; and as the event is not wholly in favour of either party, neither of them is entitled to costs—*Gribble v. Buchanan*, 18 Com. B. 691 (E. C. L. R. vol. 86); S. C. 26 Law J. Rep. (N. S.) C. P. 24; *Boodle v. Davies*, 3 Ad. & E. 200 (E. C. L. R. vol. 30); *Yates v. Knight*, 2 Bing. N. C. 277 (E. C. L. R. vol. 29); S. C. 5 Law J. Rep. (N. S.) C. P. 12.—(He was then stopped by the Court.)

Hannen showed cause in the first instance.—In the cases cited, not only the cause, but all matters in difference, were referred; here the reference is of all matters in difference in the cause only; and the Master was right in taxing the costs, just as if the issues had been decided by the finding of a jury, instead of by the award of an arbitrator. Here the whole costs are to abide the event of the award; they are therefore

to be taxed as costs in the cause—Wood v. O'Kelly, 9 East 436; Russell on Awards 380; and to be distributed according to the finding on the several issues. In The Matlock Gaslight and Coke Company v. Peters, 2 E. & B. 215 (E. C. L. R. vol. 75), S. C. 25 Law J. Rep. (N. S.) Q. B. 273, the arbitrator had power, as here, to direct how the verdict should be entered, and by the award he directed a verdict for the plaintiffs; and Lord Campbell said, "that, *as to the action*, is the event of the award."

Honyman, in support of the application.—There is no difference in principle between this case and Gribble v. Buchanan. There are several causes of complaint here; as to one, the arbitrator finds for the defendant. What distinction can there be between this case and a case where the arbitrator finds the event of the cause in favour of one party and the matters in difference in favour of the other? [WILLIAMS, J.—Where the reference is of the cause and all matters in difference, and the costs are to abide the event of the award, that means some general event. But where the cause only is referred, and the costs are to abide the event, the decision of the cause is the criterion. What distinction is there between the event of the cause and the event of the award which disposes of the cause, where the reference is "of all matters in difference in the cause," and not "of the cause and of all matters in difference" also?]

A further question arises, as to how the costs of the issue upon the plea of justification ought to be taxed. The plea contains three distinct grounds of justification; the defendant proved enough to answer the count pleaded to, and he is therefore entitled to the general costs of that issue. [COCKBURN, C. J.—That is, having succeeded as to one ground of justification, he is entitled to the costs of attempting to establish two others, which the arbitrator has found not to have been proved. That seems a monstrous proposition. WILLES, J., referred to Biddulph v. Chamberlayne, in which the Court of Queen's Bench (*dissentiente* Erle, J.) held, that an issue found for the plaintiff, being indivisible as far as regarded the verdict, it was indivisible also as to costs.]

COCKBURN, C. J.—As regards this last point, we think Mr. *Hannen* should have time to consider it before he shows cause. As to the first part of the motion, I am of opinion that there should be no rule. By the order of reference, all matters in difference in the cause were referred to the arbitrator; the costs of the cause, and also the costs of the order and of the reference and award, to abide the event of the award. The common sense interpretation of that is, that the costs of the cause shall abide the event of the award with reference to the cause. In Gribble v. Buchanan the costs of the reference and the award were ordered to abide the event of the award, and the event was partly in favour of one party and partly in favour of the other; and this Court held, that, under those circumstances, no costs were payable on either side. But in that case the reference was of the cause and of all matters in difference also; and it is quite possible that the matters in difference, *dehors* the cause, might be as important, or more so, than the matters in difference in the cause. And that being so, the Court may have thought that the parties did not intend the decision as to the cause to be the sole criterion as to the costs. But that consideration seems to me not to apply to a case where the cause only is referred. *Primâ facie*, in such case, where the costs

are to abide the event of the award, that means the event of the cause as decided by the award, as pointed out by Lord Campbell in *The Matlock Gaslight and Coke Company v. Peters*: Acting on that principle, justice will be done between the parties; and it is also the ordinary course of proceeding, that where the matters in difference in the cause arise on distinct issues, the costs follow the finding of the arbitrator upon those issues. I see no reason for departing from that rule; and bowing, as I do, to the authorities referred to, I am not disposed to go beyond them, or to apply them to cases which do not clearly fall within them.

WILLIAMS, J.—I am of the same opinion. There is no doubt that the case of *Gribble v. Buchanan* and previous decisions have established a rule that where the cause and all matters in difference are referred, the costs to abide the event of the award, the event means the general event of the award, and that each party is to pay his own costs, unless everything is decided in favour of one. The question is, whether we are bound to put the same construction on the order of reference in this case, where the cause only is referred, and I think we are not bound to do so. Certainly I believe the usual course is to provide that the costs of the cause shall abide the event of the cause; and I see no reason for thinking that the parties in this case meant to provide otherwise. I think no reasonable doubt can be entertained on the subject, when we find that the order expressly gives the arbitrator power to find for the plaintiff or the defendant on each issue, and to direct how the verdict in the cause should be entered.

WILLES, J.—I am entirely of the same opinion.

Hannen (Jan. 30) showed cause as to the other part of the motion.—The decision in *Biddulph v. Chamberlayne*, on which the defendant relies in support of this motion, rests on the ground that there the issue was indivisible. Here, however, the plea comprises three distinct justifications, and was capable of being divided, therefore, into three different issues. Had each justification been put in a separate plea, there would have been no difficulty; and though they are all placed in one plea, they still raise three distinct issues, at least for the purposes of taxation. The same rule should be applied as was acted upon in *Prudhomme v. Fraser*, 2 Ad. & E. 645 (E. C. L. R. vol. 29); S. C. 4 Law J. Rep. (N. S.) K. B. 87. There there was a count in libel, which contained several innuendoes, connecting the different parts of the alleged libel with the plaintiff. The jury negatived some innuendoes and affirmed others, and a general verdict was taken for the plaintiff. The Court was of opinion that the issue was divisible, and that the defendant ought to have his costs as to those parts of the declaration as charged libellous matter, the innuendoes respecting which had been negatived. The section of the Common Law Procedure Act, 1852, which applies to distributive pleas is section 75, and by that section "all pleadings capable of being construed distributively shall be taken distributively."

Honyman, in support of the rule.—The plea imputes misconduct to the plaintiff in respect of the *Orynthia*, the Baroness, and the Treasure. The arbitrator has found that the justification which was so pleaded as to the Treasure was proved. That was an answer to the whole of the count, and yet the Master has disallowed the defendant his costs on that plea, because he considered that the witnesses in support of it were called as much to prove that part of it which related to the *Orynthia*

and Baroness, as to which the defendant failed, as to prove the part relating to the Treasure, upon which the defendant succeeded. At all events, the Master was clearly wrong in giving the plaintiff any costs on this plea. It is submitted, however, that the issue on this plea of justification was found for the defendant, and that he was therefore entitled to all his costs of that issue: *Spilsbury v. Micklethwaite*, 1 Taunt. 146; *Baillie v. Kell*, 4 Bing. N. C. 638 (E. C. L. R. vol. 33); S. C., 7 Law J. Rep. (N. S.) C. P. 249. The 75th section of the Common Law Procedure Act, 1852, does not apply to a case like this, where a person gives several reasons as an answer to the plaintiff's cause of action. It is very different from the cases in which pleas have been construed distributively: *Cousins v. Paddon*, 2 Cr. M. & R. 547;† *S. C.*, 5 Law J. Rep. (N. S.) Exch. 49; *Parr v. Jewell*, 16 Com. B. 684 (E. C. L. R. vol. 81). The present case cannot be distinguished from that of *Biddulph v. Chamberlayne*; and unless that case is to be overruled, the defendant is entitled to all his costs of the second plea, he having succeeded upon the issue which was taken on it.

Cur. adv. vult.

COCKBURN, C. J. (June 12), delivered the judgment of the Court.—This was a rule obtained by the defendant, calling upon the plaintiff to show cause why the taxation of costs should not be reviewed. The action was for slander. The declaration contained four counts. The defendant pleaded not guilty to all the counts, and further, to the second count, a multifarious plea of justification, setting forth a series of statements of facts, any one of which would be a sufficient answer to that count. The plaintiff took issue upon the pleas. The cause was referred to arbitration, and the arbitrator has found for the defendant upon the plea of not guilty to the first and third counts, as to which no question arises. Upon the second count the finding is, upon not guilty, for the plaintiff, and, upon the plea of justification, that one of the statements in the plea forming a sufficient answer to the count is true, and that the other statements in the plea are untrue. The result is in favour of the defendant as to that plea, and he succeeds accordingly upon the second count. Upon the fourth count the finding is for the plaintiff, with 40s. damages. The question before us is, how the costs of the issue upon the plea of justification ought to be taxed, whether altogether for the plaintiff, or for the defendant as to the statement proved, and for the plaintiff as to the residue, which the arbitrator has found not proved; or for the defendant as to the part proved, and for neither party as to the residue; or altogether for the defendant. The Master has adopted the first of these courses, upon the ground that the defendant's evidence as to the parts of the plea upon which he succeeded was applicable also to that part of the plea which the finding negatived; and that such finding in the negative of part of the plea was in effect a finding of an issue for the plaintiff within the statute and rule applicable to the subject. If this was so, the Master was right in acting upon the settled practice, by which the party who is entitled to the costs of the cause is entitled to the costs of evidence applicable to any issue or issues found for him, though also applicable to an issue or issues found against him; and that the other party is entitled only to the costs of evidence exclusively applicable to an issue or issues upon which he has succeeded. This rule of taxation is

undoubtedly correct, and the question is, whether it was correctly applied to the facts. The rule of court upon this subject in force before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), was that of Hilary Term, 2 Will. 4, r. 74, that "no costs shall be allowed on taxation to a plaintiff upon any issue or issues upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." And now, by the 81st section of the Common Law Procedure Act, 1852, it is provided, that "the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues." It appears, therefore, that the Master was right, if there was an issue within the meaning of the act found for the plaintiff upon the plea of justification, to which issue the evidence for the defendant upon the portion of the plea found for him was in part applicable, and we are of opinion that there was not. The defendant might have divided the plea into as many distinct pleas as it contains defences. In that case he would have had the costs of the defence upon which he succeeded. He, however, has pleaded all his defences in one plea. There is no substantial demerit in that. At the common law duplicity must have been objected to by special demurrer. If not specially demurred to, a double plea was good, without the aid of any statute of jeofails, or act allowing double pleading. A defendant at the common law had no costs of issues found for him in any case where the plaintiff was entitled to the general costs of the cause: now he has; but that cannot affect the question, what is the issue upon the plea? Now that special demurrers are abolished, the remedy of a plaintiff who may be embarrassed by such a plea is to apply to a judge to strike it out, or perhaps, to order the defendant to divide it into several; but if the plaintiff does not think proper to make that application, the consequence is, that the defendant has pleaded in one plea, without objection, several distinct and sufficient defences, any one of which being shown to be true, the plea is proved, and the defendant succeeds. In effect, therefore, the issue joined upon a double or multifarious plea is, whether either of the defences set up therein is true. If either of them be true, the verdict upon that issue must be for the defendant. The jury may, undoubtedly, give a special verdict, finding one of the alleged defences for the defendant, and that the residue of the plea is untrue, referring the question, whether the issue is proved, to the court; and if it were questionable whether the matter found to be true constituted a justification, that would be a proper course to take. But if, as here, the matter found to be true clearly constitutes a justification, the latter part of such finding does not alter the effect of the former, which alone constitutes a sufficient defence, in whatever form the finding may be as to the residue of the plea. The second count is disposed of altogether in favour of the defendant. Reliance was placed by the plaintiff's counsel upon the 75th section of the Common Law Procedure Act, 1852, as making the issue distributable; but that section is inapplicable, being intended to meet cases in which the verdict may be so distributed as to constitute an answer to the previous pleading, though only in part, that is, such an answer as might, before the statute, have been set up by a pleading expressly limited to part; in which cases injustice was done, before the statute, by entering a verdict

for the plaintiff or the defendant, upon the ground that the issue was in form indivisible, though, upon the evidence, a good defence or cause of action was made out in part. The present taxation, founded upon the assumption that an issue upon the plea of justification was found in favour of the plaintiff, must therefore be set aside. The rule will, consequently, be absolute upon that ground.

But as we have thus far only decided that the defendant is entitled to the costs of so much of the plea as was expressly found in his favour, the parties might be involved in needless expense, unless we proceed to direct how the taxation is to take place with reference to the further question, whether the plaintiff is to have his costs of the part of the plea expressly found to be untrue; and if not, whether the defendant is to have his costs of such part, or only the costs of the part of the plea expressly found to be true. This subject was discussed in *Biddulph v. Chamberlayne*, decided in the year 1851, upon the construction of the general rule of the court already mentioned. In that case the plaintiff complained of a libel containing several defamatory statements. The defendant pleaded a justification. The judge, at the trial, having asked the jury to find separately as to the truth of the several allegations justified, the jury found some to be untrue, and the others true. The plea being pleaded to more than was found true, and there being then no statute making it distributable, a general verdict was directed and found for the plaintiff, so that nothing appeared upon the record to show that the jury had found a portion of the matters alleged by the defendant to be true. The majority of the Court of Queen's Bench (*dissentiente* Erle, J.) held, that the plaintiff was entitled to the costs of the whole plea, and set aside a judge's order, depriving the plaintiff of the costs of witnesses called only to disprove the part of the plea which was found to be true. The reasons of the court fully appear in the judgment of Coleridge, J., who said: "The safe course is, to limit the rule of Hilary Term, 2 Will. 4, r. 74, to issues which may be found on the record. That, I think, is the meaning of the general rule made by all the courts for the purpose of rendering the practice uniform; and if it is to be extended in the manner now sought, it ought to be done by a general rule of all the courts. That alone I consider a sufficient reason for setting aside this order. But further, I cannot but think that if, to advance what we suppose to be the justice of this case, we were to extend the rule as asked, we should lay down a most inconvenient rule of practice. If an issue, indivisible for the purpose of the verdict, may be divided for the purpose of costs, I do not know where to stop; the party would have, at least an equitable right in all cases to ask the judge to put the allegations separately, which would be very inconvenient. But that is not all; it would follow that the master must, as it were, re-try the cause, so as to ascertain the materiality of each witness as to each allegation. I think it much better to adhere to the rule than rest it upon the supposed justice of the case. I say, supposed justice; for it must be remembered, we have not complete knowledge of all the circumstances." Since the Common Law Procedure Act of 1852, the question will probably not again arise in the same form as in the above case, because, under similar circumstances, the defendant would now, by force of the 75th section, be entitled to a verdict as to the part of the plea which was found to be true. But the case is still in point where, as in the

present case, there is a general denial of a multifarious pleading, which, for the reasons already given, cannot be distributed under the 75th section, and a general finding by the jury in the affirmative of the issue so raised. Therefore, if there had been in *Biddulph v. Chamberlayne* a special verdict to the effect of the answers of the jury to the judge, that case would have been in point, and that circumstance would probably have been considered unimportant by the majority of the court. Therefore, if our decision could be taken to a court of error, we should feel bound by that case as a precedent. Doubting, however, as we do, whether the record could be framed so as to raise the point, and seeing that it is one of a class which rarely finds its way into a court of error, we think we ought to deal with the case as one in which there is no appeal, and act upon our own judgment, if upon reflection we are unable to agree to the decision of the majority in *Biddulph v. Chamberlayne*.

We proceed, therefore, to consider the points there decided. First, it was there assumed throughout, that the party against whom the issue was found was not entitled to the costs of the averments found in his favour at the trial to be untrue. This we think was right, upon the ground already stated, that costs apart from costs in the cause are only given by the rule of court and the statute to a party succeeding upon an issue; and the defendant in that case, like the plaintiff in this, had not succeeded upon any issue upon the plea of justification. The decision in that case, that the plaintiff was entitled to the costs of witnesses called to contradict what was found to be true, rests upon different grounds, stated at large in the judgment of Coleridge, J., already set forth. One, at least, of those grounds does not exist in the present case, viz., the inconvenience that "the Master must, as it were, re-try every cause, so as to ascertain the materiality of each witness as to each allegation." That would be unnecessary here, for the finding of the arbitrator is not general, like that of the jury in *Biddulph v. Chamberlayne*, but special: that the plea is as to part true, and as to the rest untrue. It was contended, for the defendant, that the finding of the arbitrator, so far as it negatived part of the plea, was immaterial; but this argument ought not to prevail. The arbitrator was put, by consent, in the place of a judge and jury; and if the cause had been tried in an ordinary way, it would have been competent for the jury to find specially in the form of the present finding, every word of which would have been part of the verdict, and must have been considered by the court, if called upon so to do, before pronouncing judgment. A formal reference of the question to the court was unnecessary, because the arbitrator is put in the place of the court as well as of the jury. Treating, therefore, that finding of the arbitrator as an authorized act, the Master has here the means of at once determining the question, which the general form of the finding left open in *Biddulph v. Chamberlayne*. But we are prepared to go further; for we should be sorry to admit it possible that there is any imperative rule of law or inveterate practice, by which we are compelled to order that the expense of unsuccessfully attempting to prove falsehoods, which we know by the information of the judge to have been found false by the jury, must nevertheless be paid for by the party who so far had truth on his side. We apprehend that we may, and if we may we ought to, prevent our proceedings from being abused and perverted; and that we ought not to abstain from

doing so in a case where the truth appears, because there may arise many others in which we cannot arrive at it. We apprehend that the court is bound not to allow a successful party all the expense he may have thought proper to incur, where we can see that part of it has been needless. If a party were to insist upon calling fifty witnesses to prove a notorious fact, formally involved in a disputed issue, we may doubt whether the judge could lawfully reject the evidence of any one of them; but we cannot doubt that the Master would not allow, and that the court would uphold the Master in not allowing, the expenses of them all. Quite independent of statute and rule, a discretion ought to be, and is in practice, exercised as to the amount of costs; and useless expenditure ought to be and is in practice disallowed. The Master ought to look to the finding upon the issue, when there is nothing else in the proceedings to guide his discretion. But where, as here, there is matter ascertained in the cause, whether appearing upon the face of the proceedings or established by the statement of the judge, founded upon his judicial knowledge of the facts, whereby the Master is satisfied that witnesses called by the successful party have been wholly useless, and their evidence is as completely thrown away as if they had sworn to a truism or an irrelevant fact, he ought to disallow the expenses of such evidence as at least unnecessary. That is so in the present case. The costs exclusively applicable to the part of the plea found to be untrue ought, therefore, not to be allowed to the defendant. It follows, that the rule to review the taxation ought to be absolute, with a direction to the Master to allow the plaintiff no costs of any part of the plea of justification, and the defendant costs only of the part of that plea expressly found to be true, including costs of evidence applicable to such part, though also applicable to the residue of the plea; but not costs of any evidence applicable only to that part of the plea which was found to be untrue.

Rule absolute.

PHILLIPS and Another v. CLARK. Jan. 13, 1859.(a)

A bill of lading, containing in the margin the words "not accountable for leakage or breakage," the goods taken on board being casks of wine, does not exempt the master from the ordinary condition of due care in the stowage of the casks.

"Gross negligence" is a term properly used to describe the sort of negligence for which a gratuitous bailee is responsible; it cannot properly be said of an unskilled person who does not use skill; it is only applicable where a skilled person does not use the skill he has.

THE cause was tried before Cockburn, C. J., at the last sittings at Guildhall, when a verdict was found for the plaintiffs. The declaration was on a contract by the defendant, as master and owner of *The Bengal*, to carry goods, viz., certain casks of sherry, on board the defendant's ship for hire, and to take due and proper care in and about the stowage, &c.; and that the defendant, neglecting, &c., had not taken due and proper care in and about the stowage of the casks, whereby a loss to the plaintiffs arose by reason of the leakage and breakage of the casks. Pleas: first, that the plaintiffs did not deliver, nor did the defendant accept, the goods on the terms alleged; secondly, not guilty; thirdly,

that the damage arose wholly from certain perils and casualties, excepted, &c.; fourthly, that the plaintiffs delivered the goods, and the defendant accepted them, to be carried as in the declaration, upon the express condition that he should not be accountable for leakage or breakage. Averment, that the loss and damage, &c., arose wholly from leakage and breakage. Replication. Joinders in issue; and also, for replication to the fourth plea, the plaintiffs say that the condition in that plea, &c., consisted of certain words inserted by the defendant in the margin of the bill of lading under which the said goods were shipped, &c. [setting out the bill of lading, in the margin of which appeared the words, "Weight and contents unknown; not accountable for leakage or breakage."] And the plaintiffs further say that the loss and damage in that plea mentioned arose wholly from the gross negligence of the defendant and his servants in and about the stowage of the said goods, and not otherwise. Issue. The jury found a verdict for the plaintiffs on the second replication, saying they could not define the word "negligence," but they found generally for the plaintiffs on that issue; but that they were not agreed whether the defendant was guilty of negligence. The Lord Chief Justice ordered the verdict to be entered for the plaintiffs, amending the replication by striking out the word "gross," and gave leave to the defendant to move to enter the verdict for him, on the ground that the amendment ought not to have been made.

M. Chambers, Q. C., now moved accordingly to set aside the verdict, and enter it for the defendant, or for a new trial, on the ground that the amendment directed by the learned judge was not within his jurisdiction, because it would make the replication bad, and on the ground of misdirection.—There were some bags of rice placed upon the casks, but we had abundant evidence that there was no negligence. There was, no doubt, evidence to the contrary, both sets of witnesses speaking to opinion; in truth, it was a question of opinion, not of fact; the issue could only be proved one way or the other as a matter of opinion. It would not follow that there was negligence in the stowage, from the fact, if made out, that the pressure of the bags produced the leakage of the casks, so as to justify this verdict. [COCKBURN, C. J.—You never took that point before me; you went to the jury. If a carrier places a heavy trunk on a handbox, instead of putting the handbox on the trunk, nobody could doubt that to be negligence. Then here it becomes a question of degree, and therefore it was, in fact, for the jury to say whether there was negligence or not. CROWDER, J.—Were the jury told that it was for them to consider whether a prudent man, in the exercise of ordinary care, would have stowed in this way?] No, certainly not. [COCKBURN, C. J.—The question at the trial was, whether the casks broke by reason of their own undue construction, or whether by reason of the too great superincumbent weight.] Now, for the defendant it is contended that, there being conflicting opinions among the witnesses, the result is that there is no evidence of negligence, for it is *bonâ fide* doubtful what is the right and what the wrong course to take. The jury ought to have been told, "If you think that there would be a reasonable conflict of opinion among prudent and experienced men as to the mode of stowing these casks, then there is no negligence." [CROWDER, J.—It has been put over and over again, "Gentlemen, one set of witnesses depose one way, and the other the other way; it is for you to say

whether the defendant stowed with ordinary care and prudence." Your argument takes the question out of the hands of the jury. In my mind it is clear there was negligence enough to entitle the plaintiffs to the verdict.] Gross negligence occurs when a person goes into a thing with his eyes open ; as, if a man leaves money loose on a table, that is gross negligence ; if he leaves it in a drawer, though unlocked, that is negligence, but not gross negligence: *Quarman v. Burnett*, 6 M. & W 499.†

WILLIAMS, J.—There seems to me to be no difference, in the circumstances of this case, between the averments of negligence and gross negligence. The defendant having contracted not to be liable for breakage or leakage, does not absolve him from the ordinary condition with regard to stowage ; therefore the case is the same as if the contract contained no exception at all. What, therefore, this replication must be understood to mean is, that the leakage is attributable to the defendant's negligence in not properly stowing the casks. Therefore the verdict ought not to be disturbed on this ground. Next as to whether there was any misdirection. Now, it appears to me that the contest at the trial was mainly this:—On the part of the plaintiffs it was insisted that the wine was put on board in sound casks, and that they were broken, and so leaked, by reason of the undue weight that was laid on them. On the defendant's it was said that the casks were not sound, and that at all events there was no negligence in the stowage ; and various witnesses deposed that it was not improper, according to the ordinary practice of the trade, to stow bulky goods above casks of wine, as was done in this case. This was evidence to go to the jury, to enable them to come to a conclusion whether ordinary care had been applied in the stowage of these goods. I think it was left to the jury in a very proper way, to say whether the defendant was guilty of negligence in placing these bags of rice, in the manner described in the evidence, over the wine casks.

CROWDER, J.—The first point is, whether the replication, as amended, is bad, so that the plaintiffs are not entitled to judgment on it. Now, I think that the replication, as it now stands, is perfectly good, and that the defendant must be liable, if it be established that he has not used ordinary care in stowing the goods, which is negligence. It does not appear to me to be necessary here to go into the question of the degree of negligence that has been manifested ; it may be described by "gross," or other such epithet ; but here the master of the vessel, who takes charge of the goods, is bound to use ordinary care in the stowage of the vessel ; if he does not he is guilty of negligence ; and that, I think, is the case here. Then, as to the alleged misdirection, it would seem that the main question raised on one side, and met on the other, was, whether the superincumbent weight was so extraordinary as to produce the breakage of the casks, or whether the casks were so insufficient in their construction that the breakage which took place would have been produced all the same by an ordinary weight laid upon them. If Mr. *Chambers* is right in his view, he would have been justified in asking my Lord to stop the case ; but I think that if the result of the evidence was clearly to establish that the undue weight of the bags of rice caused the breakage, no one can doubt the placing that undue weight there to be negligence. The persons who said that they would have stowed in the same

way, the jury did not believe; and I think they were perfectly wise in that, with the smashed casks before them. The question was, which set of witnesses they would believe. My Lord put it to them whether they thought, on the whole, that there was evidence, and he distinguished between gross negligence and mere negligence, and told them that if they thought, on the whole evidence, that there was negligence, their verdict must be for the plaintiffs; and in that direction I think he was quite right. The meaning of the actual finding seems to me to be, "Whether there was gross negligence or not we do not find; we throw that back on the lawyers to settle."

WILLES, J.—I am of the same opinion. As to the direction, the Lord Chief Justice told the jury, in effect, that if they found negligence, that proved the replication; which I think was quite right. Some confusion has been introduced into this question in some cases by the use of the word "gross;" but I think it is a mistake to say that the word was erroneously used in the earlier cases; although, as is observed in *Hinton v. Dibbin*, 2 Q. B. 661 (E. C. L. R. vol. 42), in none of the cases up to that time was any definition given or distinction attempted to be made between the two; and Lord Wensleydale observed, in *Wyld v. Pickford*, 8 M. & W. 460,† that in many cases "the carrier is said to be responsible for gross negligence, but in some of them that term has been defined in such a way as to mean ordinary negligence, *Story's Bailm. s. 11*,—that is, the want of such care as a prudent man would take of *his own property*." In *Wilson v. Brett*, 11 M. & W. 115,† Lord Cranworth said that he could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet. In delivering the judgment of this court in *Austin v. The Manchester, &c., Railway Company*, 16 Jur. 766, Cresswell, J., said, "The term 'gross negligence' is found in many of the cases reported on this subject, and it is manifest that no uniform meaning has been ascribed to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire." I think that is the true view; gross negligence can only be said of a person who omits to use the skill he has, not of a person who is without skill. In effect, that is what Cresswell, J., says in the case mentioned, and that is the civil law exposition of *crassa negligentia* or *lata culpa*. Then, as to the direction, I agree that a mere erroneous judgment in a case where a skilful man, knowing his business, might have done the same thing, would not make the act done evidence of negligence, and I think the direction was right; and I will add, that, as to the evidence, I should have thought that the fact of the smashing in of the casks spoke for itself, and could have proceeded from nothing but negligence in the stowage.

COCKBURN, C. J.—On the further consideration which I have been able to give to this case, I think the view taken by the court is the right one. Though a carrier may stipulate for immunity against loss from circumstances that might imply accident only, it is not so where the loss arises from his own negligence. The jury here, having found there was negligence, evaded the responsibility of giving any opinion whether there was more than ordinary negligence, or anything that amounted to gross negligence. That was sufficient, in my opinion.

Rule refused.

FITZGERALD and Others *v.* DRESSLER. Jan. 12, 14, and 18.(a)

A., the importer of certain goods, parts with the property in them, by a contract of sale to arrive, to B.; then B. sells to C.; these sales being effected by one broker; and C., being desirous of getting possession of the goods, applies to A., who on their arrival retains possession of them for a delivery order; this he is told he cannot have except on handing over a check for the price due to A., or thereabouts; he then, or his managing clerk, sends another clerk, a boy of sixteen, with orders to follow it up, and he, upon being told that the delivery order cannot be given except as against a check, promises that the defendant will pay, and so obtains the order, and a check, for a sum which covered the much larger proportion of the price, was sent the next day to the broker. It was in evidence, however, to be the usual practice of the defendant's house of business to send out a check against a delivery order, and it was expressly denied, and not contradicted, that the defendant or his managing clerk gave any authority to the boy to make the promise:—Held, that there was not sufficient evidence for the jury to draw an inference from, that the promise to pay was authorized or ratified by the defendant.

In such case, the time for B.'s payment to A. of the price agreed on not having arrived when C. applied for the delivery order, his promise to pay for the goods, if A. would take off his lien, would not have been a promise to pay for the debt, default, or miscarriage of another, within the Statute of Frauds, so as to require a note in writing to validate it.

In this case *Garth*, in Easter Term, 1858, had obtained a rule calling on the plaintiffs to show cause why the verdict found for them at the trial, at the Sittings after Hilary Term in that year, at Guildhall, before Cockburn, C. J., should not be set aside, and instead thereof a verdict be entered for the defendant, or a nonsuit entered, on the grounds that there was no sufficient evidence that the contract relied upon by the plaintiffs was authorized by the defendant; that the contract should have been in writing; and that there was no proof of the goods having been delivered to the defendant, as alleged in the first count of the declaration. The plaintiffs declared, in the first count, for money which the defendant agreed with the plaintiffs to pay to the plaintiffs, in consideration that the plaintiffs, at his request, and with the consent of the purchasers from the plaintiffs of certain goods, upon which, for the price thereof, the plaintiffs had a lien, delivered the said goods to the defendant. Secondly, for goods sold and delivered, for interest, and for money due on accounts stated. Plea, never indebted. Issue thereon. The plaintiffs' particulars stated the action to be brought to recover 121*l.* 15*s.* 6*d.*, and interest thereon from the 1st January, 1856, up to the judgment; the plaintiffs' claim being made up as follows:—1026*l.* 5*s.* 9*d.*, the price of 682 bags of linseed, referred to in a delivery order made by the plaintiffs, dated the 1st January, 1855, and endorsed to the defendant by Dale, Morgan & Co., at 3*l.* 14*s.* per quarter, such price being that agreed in a contract between the plaintiffs and Messrs. Haakman, Jansen & Co., dated the 25th September, 1855, of the terms of which contract the defendant has had full notice; and 3*l.* 10*s.* 6*d.*, the proportion of metage chargeable to the defendant; less 33*l.* 4*s.* 3*d.* deducted for damage to the said goods, and less 24*l.* 16*s.* 6*d.* discount at 2*l.* 10*s.* per cent., and less 850*l.* which the plaintiffs admit to have been paid to them on account of the said price. The plaintiffs are merchants in the city of London (trading as Greenhill & Co.), as is also the defendant. On the 25th September, 1855, the plaintiffs entered into a contract with Messrs. Haakman & Co., through Dale, Morgan & Co., their brokers. The following is the form of the sold note:—

"London, Sept. 25, 1855.

"Sold this day, for Messrs. Greenhill & Co., to Messrs. Haakman, Jansen & Co., the contents G. & Co., 682 bags of Calcutta linseed, expected to arrive per Piquot from Calcutta; warranted of sound merchantable quality, and of fair average, of this season's shipment, made at that port, at 74s. per quarter, duty free; to be worked and paid for in fourteen days from landing, after arrival here, in ready money, allowing 2l. 10s. per cent. discount. Should the quality of the linseed, on arrival here, not turn out equal to the warranty specified above, be sea or otherwise damaged, or out of condition, this contract is not to be cancelled on that account, but the same to be taken with an allowance, to be fixed by the brokers. DALE, MORGAN & Co., Brokers."

On the 6th November, 1855, Messrs. Haakman & Co. sold the linseed, at a profit of 1s. 3d. a quarter, to William Schenck, the same brokers acting between the parties, and the following is the form of the sold note:—

"London, Nov. 6, 1855.

"Sold this day, for Messrs. Haakman, Jansen & Co., to Mr. William Schenck, the contents, G. & Co., 682 bags of Calcutta linseed, expected to arrive per Piquot from Calcutta, warranted of sound merchantable quality, and of fair average, of this season's shipment, made from that port, at 75s. 3d. per quarter, duty free; to be worked and paid for in fourteen days from landing, after arrival here, in ready money, allowing 2l. 10s. per cent. discount. Should the quality of the linseed, on arrival here, not turn out equal to the warrant specified above, be sea or otherwise damaged, or out of condition, this contract is not to be cancelled on those accounts, but the same to be taken with an allowance, to be fixed by the brokers.

(Signed)

"DALE, MORGAN & Co., Brokers."

On the 28th December, 1855, Schenck, by the same brokers, sold the linseed to the defendant at 77s. per quarter, and the sold note was in the following form:—

"London, Dec. 28, 1855.

"Sold this day, for William Schenck, Esq., to Mr. Gustavus Dressler, the contents, G. & Co., 682 bags of Calcutta linseed, ex Piquot, lying in the London Docks, of sound merchantable quality, *per sample*, at 77s. per quarter; to be worked and paid for in fourteen days, in ready money, allowing 2l. 10s. per cent. discount. Any damaged or sweepings in the above parcel of linseed to be taken, with an allowance, to be fixed by the brokers.

(Signed)

"DALE, MORGAN & Co., Brokers."

Shortly afterwards the defendant applied to Dale, Morgan & Co., for a delivery order, as he wanted to get possession of the seed for exportation. The plaintiffs having previously told the brokers that it was not their intention to give up possession of the seed without being previously paid, and on the defendant sending his clerk to the brokers' office for the delivery order, the clerk was told that payment would be required. On the 2d of January, 1856, a clerk of the defendant, who applied for the order, was told by the plaintiffs' managing clerk, Gardiner, that a delivery order could not be given without their receiving a check for the value of the seed, or thereabouts; and the defendant's clerk thereupon

undertook to send the check accordingly, and Gardiner made a memorandum in his diary to that effect, and then gave the defendant's clerk the delivery order, signed and filled up, so that Dale, Morgan & Co might endorse it to the defendant when the check should have been given. It appears, however, that Mr. Morgan endorsed the order, and gave it to the clerk on his promise to bring a check for the amount. In the course of the next day the defendant sent to Dale, Morgan & Co. a check for 900*l.*; and on the 2d of January, 1856, Dale, Morgan & Co. sent the plaintiffs a check for 500*l.*, and on the following day another for 300*l.*, and since the action had been commenced they have sent 50*l.* more, making in all 850*l.* paid. At this time the seed had not been measured, so that the precise sum due from the defendant was not ascertained. The following is the form of the delivery order:—

“Jan. 1, 1856.

“To the Superintendent of the London Docks.

“Sir,—Please to deliver to Messrs, Dale, Morgan & Co. the under-mentioned packages, ex Piquot, Capt. —, from Madras, entered by ourselves the 18th December, 1855, all charges and rent, if incurred to prompt, to be paid by our deposit account.

Marks.	No.	Particulars.
G. & Co.		The contents of six hundred and eighty-two bags of linseed. (682 bags). Signed p. pro. Greenhill & Co., THOMAS GARDINER.”

(Endorsed)

“Deliver to Gustavus Dressler, or order.

“DALE, MORGAN & Co.

“Keep the within to my order.

“Pro Gustavus Dressler,

T. H. DUMAS.”

The seed was measured about the 26th January, 1856, and found to be as follows:—

224½	quarters	.	.	.	.	Sound.
41½	“	.	.	.	.	Slightly damaged.
1	“	.	.	.	.	Badly damaged.
10	“	.	.	.	.	Sweepings.

Making a total of 277½ quarters, the contents of the 682 bags. After the measurement the brokers made out and sent to the plaintiffs an account, showing that they were entitled to be paid by the defendant 97*l.* 15*s.* 6*d.* for the seed, of which the defendant had handed over 900*l.* to Dale, Morgan & Co. The defendant refused to pay the balance to the plaintiffs, on the ground that there was no privity between them; that the brokers never mentioned the names of the plaintiffs to him at the time of the contract; and that Schenck, with whom the defendant had numerous transactions, was indebted to him in a sum exceeding the balance in question. Schenck became bankrupt sometime after the prompt had expired, which, by the contract of the 28th December, 1855,

would be on the 11th January, 1856. It being proved at the trial that the defendant's clerk (as above stated) had got the delivery order from the plaintiffs on promising to pay them, by bringing his master's check for the amount, it was objected by the counsel for the defendant that the clerk, being a boy of sixteen, as proved, had no authority from the defendant to make a new contract; but the learned judge ruled, that if what the defendant's clerk said was the means by which he got the goods, the defendant must be regarded as having taken the goods on those terms; and it was then proved that Messrs. Dale, Morgan & Co. had delivered the order to the clerk, because he had told them that he had promised to pay the plaintiffs, and that he obtained their endorsement of the delivery order by what he said had passed between him and the plaintiffs, viz. that he had promised he would pay for the seed. Schenck stopped payment on the 17th January, 1856. The managing clerk of the plaintiffs proved that the defendant's clerk promised that the defendant would pay if he got the delivery order, and that on that the order was given to him. The managing clerk had previously received permission from the plaintiffs to give up the order on a promise that the defendant would pay them. It was also in evidence that the defendant had been told that the plaintiffs were the importers at the time of the contract, and on his applying for the delivery order, that he was told, a few days after the contract, by Messrs. Dale, Morgan & Co., that the plaintiffs would require a check, at all events, before the delivery, and that he assented to this. But the defendant swore that he did not know the plaintiffs to be the importers at the time of the contract, or when he asked for the delivery order, nor was he told so on either occasion, and that he never authorized the clerk in question to enter into any contract for him, and that he was not told that the clerk had promised to send a check, and that it was sent the same day as the delivery order was received, because it was the usual practice of his house to send out a check against a delivery order. There was evidence that the defendant was in immediate want of the seed, and that Dumas, the defendant's managing clerk, had urged the clerk, Harvey, to get the delivery order at all events, or to that effect. The learned judge left it to the jury to say whether there was any engagement to pay the plaintiffs, on giving up the order by the clerk, by the authority of the defendant, and whether that was assented to by Haakman; and leave was reserved to the defendant as above stated, the court to have power to draw inferences of fact not inconsistent with the finding of the jury, which was for the plaintiffs.

Jan. 12.—Piggott, Serjt. showed cause.—The result of the evidence is submitted to be this, that if the plaintiffs will give up their lien, the defendant promises to pay the price of the goods direct to them, instead of paying his immediate vendor. The defendant had made a contract for the sale of the linseed at an advanced price with a third person; that made him anxious to get immediate possession of it. The question is, whether the plaintiffs agreed to take the promise of the defendant's clerk to pay, whether the clerk did actually promise or not, and whether he had authority to promise to pay; and the last is the important point in the case. The defendant said in his evidence that his head clerk, Dumas, had a general authority to conduct his business. The plaintiffs sold to Haakman; they want what Haakman owes

to them, not what Schenck owes to his vendor. The question is, whether from the whole of the circumstances, it appears that there is authority to make the terms on which alone the plaintiffs were prepared to part with the delivery order. Dumas said that he had no authority to authorize Harvey (the clerk of the defendant who went for the delivery order to Messrs. Dale, Morgan & Co. and to the plaintiffs), and that he did not authorize Harvey to enter into any contract; but he said: "I gave him a check in favour of Messrs. Dale, Morgan & Co." He said he did not know anybody in the transaction behind Schenck. The clerk, Harvey, said he had promised that the defendant would pay for the seed, and that he had got the delivery order on the faith of that promise. [WILLIAMS, J.—The difficulty is to show that Dumas was privy to it.] The check was written and signed in confirmation and ratification of what the clerk had promised; it showed an acquiescence in the terms on which he got the order, of which the defendant had the benefit. There is no evidence of a promise to pay less than the whole amount of the price. [WILLES, J.—If the check had not been given, the delivery order being parted with, there would have been a clear ground for an action of tort, as is shown by *Gregson v. Ruck*, 4 Q. B. 737 (E. C. L. R. vol. 45).] It appears that the jury found Dumas to have authorized Harvey, though there perhaps might have been some looseness in the way in which the business was done. In the text-books, speaking of authority conferred on an agent, it is said that it may be express or implied; and unless the contrary manifestly appears to be the intent of the party, it is always construed to include all the necessary and usual means of executing it with effect. (Story on Agency, s. 57.) He proceeds, "So an agent, employed to procure a bill or note to be discounted for his principal, may, if it be necessary or proper to accomplish the end, endorse the same in his own name, although not endorsed by his principal, and in such case he will be entitled to be indemnified by his employer," (citing *Ex parte Robinson*, Buck. 113; Bayl. Bills, c. 2, s. 7, 5th ed.). Now, here it is submitted that our view of the case is fully supported by what Story lays down. The question is, is there any evidence to go to the jury of authority to make the purchase having been given to Harvey? [WILLES, J.—*Ex parte Robinson* is no authority at all for the proposition it is cited for in Story's book. COCKBURN, C. J.—How were the plaintiffs to get the difference between the 900*l.* (which they have got) and the total claim?] They might have got it from Haakman. [COCKBURN, C. J.—No; because they did not deliver to him. It seems to be very much the practice in this trade for the broker, who is the agent for all parties, to receive from the last buyer, and distribute among all the intermediate sellers.] The second question is on the Statute of Frauds, that this was a contract to pay the debt of a third person, and ought, therefore, to have been in writing; it was a contract, they say on the other side, to pay the debt of Haakman. Now, the prompt, in that case, would not arise till several days later; for it was not till fourteen days from the landing; but the goods were not landed till the 19th January; therefore the 2d February was Haakman's prompt. If that be so, where was any debt due from Haakman at the time of the defendant's contract? Haakman's contract was to accept the goods when they arrived, and to pay for them a certain time after he accepted them; he might be liable to an action for not accepting them, but he could not be

liable for the price of the goods which he had not accepted. There is, therefore, no debt, default, or miscarriage of a third person here. Another answer is, that there is not a collateral undertaking of any kind; it is an original undertaking, for a new consideration, which the defendant enters into. [COCKBURN, C. J.—Is that your declaration? It says that the goods were sold to somebody else, but the plaintiffs had a lien upon them.] This, it is contended, is an original engagement between the plaintiffs and the defendant; it is like the case where the landlord distrains, and the auctioneer promises to pay the amount. [WILLIAMS, J.—That is where the goods are the goods of the promissor: *Williams v. Leper*, 3 Burr. 1880.] There the goods had been assigned to the defendant. By an amendment in the declaration, at any rate (which it is in the power of the court to make), the case might be rendered exactly similar to *Williams v. Leper*. In *Thomas v. Williams*, 10 B. & C. 664 (E. C. L. R. vol. 21), the parties concerned were tenant, auctioneer, and landlord, and it was held that the verbal promise of the defendant, the auctioneer, to pay the rent due to the landlord, the plaintiff, was a promise to pay on a new consideration. [WILLIAMS, J.—That case is distinguishable from *Williams v. Leper*, and does not advance you at all.] Lord Tenterden there says, that the mere circumstance that he does pay the debt of another is immaterial. In that case the court reviewed the cases of *Edwards v. Kelly*, 6 M. & Sch. 204, and *Castling v. Aubert*, 2 East 325; and the court observes, “In those cases the promise was founded on a new consideration, distinct from the demand that the plaintiff had against the third person, although its performance would have the effect of discharging that demand and releasing that person.” [COCKBURN, C. J.—The plaintiffs here have parted with the property in these goods by selling them to Haakman, and then they are not bound to part with the possession of them till Haakman pays. Then the defendant says to them, “If you will give them up, I, who have an interest in them, will engage to pay you for them.” That is not a mere buying of a lien; that is paying in place of Haakman; it is very like paying the debt of Haakman, the first buyer.] The defendant says, “I will discharge a lien against the goods;” that is not a collateral engagement to pay the debt of another. In substance this is the same case as *Williams v. Leper*. The defendant’s promise may have the effect of releasing another person from a part of the debt due from him to the plaintiffs, but the primary object of the promise is not that; and what the law looks at is the primary object of the promise. [WILLIAMS, J.—The test, whether within the statute, never can be what the consideration is; (1 Wms. Saund. 211 c, note (d)); there must be a new contract to take it out of the statute. I do not see how delivery to the defendant was not delivery to Haakman. WILLES, J.—It is like the case of a charter-party and a bill of lading, which passes through a dozen hands; the master must deliver to the last holder, and that is a delivery to the charterer.] This is no more within the statute than a promise to pay damages by a third person in case the plaintiff will withdraw the record: *Read v. Nash*, 1 Wils. 305. So *Walker v. Taylor*, 6 Car. & P. 752 (E. C. L. R. vol. 25); and the second point in *Bird v. Gammon*, 5 Scott 213; *Houlditch v. Milne*, 3 Esp. 86; and *Couturier v. Hastie*, 8 Exch. 40,† show this part of the Statute of Frauds to have been construed strictly, and to have been confined to the case of a man promising

to pay the debt of another simply, he himself getting no benefit, which is not the case here. The principle of the courts has been that one man shall not be made responsible simpliciter for the debts of another without writing. *Eastwood v. Kenyon*, 11 Ad. & El. 438 (E. C. L. R. vol. 39) illustrates this position. The case of *Fennel v. Mulcahy*, 8 Ir. Com. Law Rep. 434, decided, that where the plaintiff had distrained for rent, and a third person, in consideration of his withdrawing, promised by parol to pay the amount due, it was a collateral undertaking to pay the debt of another, and therefore void; but that case (where all the authorities are elaborately gone through) shows our case not to be within the mischief of the statute. The third point is, the other side insist that there is no proof of the goods having been delivered to the defendant; but the answer is that he has the possession and benefit of the goods.

Jan. 14.—Kemplay on the same side.—Unless there was such a contract as we allege, there was no earthly reason why the 900*l.* should have been sent. Then as to the Statute of Frauds: a promise to pay, in consideration of giving up a charge or a lien on the property of another, is not a promise to answer for the debt, default, or miscarriage of another simpliciter; the promisor gets a benefit himself; and that is fully supported by the note to *Forth v. Stanton*, 1 Wms. Saund. 211 e. Here the plaintiffs give up their lien on the property of the defendant himself; it is therefore a contract of the defendant's own. This is illustrated by *Green v. Cresswell*, 10 Ad. & El. 453 (E. C. L. R. vol. 37), which followed *Thomas v. Cook*, 8 B. & C. 728 (E. C. L. R. vol. 15). Also *Bampton v. Paulin*, 2 Bing. 264 (E. C. L. R. vol. 9), and *Hargreaves v. Parsons*, 13 M. & W. 571,† show that where, as here, the promise was that the defendant would do something which the third person was not bound to do, that is not within the statute. Here *Haakman* was not bound to pay the price of the seed at the time when the defendant got it; and the defendant undertakes to pay immediately, which *Haakman* would not have done. [He cited *Rounce v. Woodyard*, 8 Law T. 186; *Gull v. Lindsay*, 4 Exch. 45,† and *Clancy v. Piggott*, 2 Ad. & El. 473 (E. C. L. R. vol. 29).]

M. Chambers, Q. C., in support of the rule.—*Harvey* is not shown to have had authority to make this promise; at any rate it is obvious that *Harvey* could have no authority to promise to pay to the extent of paying the original buyer's debt. [COCKBURN, C. J.—The evidence was, that the broker only paid the intermediate parties, in sales of this sort in this trade, their profits when there was a rising market, and collected their contributions when the market was a falling one.] It is said that there has been a ratification of what *Harvey* did; but there cannot be a ratification unless the party, to whom the ratification is attributed, is master of the facts; but of that there was an entire absence of evidence on the plaintiffs' side; on the defendant's it was expressly contradicted; and the jury must be taken so to have found, for they find that the delivery order was obtained and endorsed on the bare promise of the clerk. Then there was no direct dealing between the importers and the defendant. *Dale, Morgan & Co.* do not act as agents between the plaintiffs and the defendant, for they say in their bill, "We have received 900*l.* on account of Mr. Schenck's demand;" they carried the sum to *Schenck's* account; they were acting between

him and the defendant. [COCKBURN, C. J.—They received the 900*l.*, not on account of Schenck, but of all the parties. WILLES, J., referred to *Godtz v. Rose*, 17 C. B. 229 (E. C. L. R. vol. 84), as to the meaning of “prompt.”] If, as was shown, the check was sent in the ordinary course of business, how can it be evidence of the promise alleged, or of the ratification of it? There is not enough in that fact to lead the court to infer authority to make such an engagement.

Jan. 18.—Garth, on the same side.—As to the Statute of Frauds, the case involves simply the question of what the promise is, irrespective of the consideration: 1 Wms. Saund. 211 e. note; *Williams v. Leper*. The case of *Houlditch v. Milne*, it is submitted, cannot be supported.

COCKBURN, C. J.—Two principal points have been made in this case. One, that there is no evidence of any authority on the part of the defendant's clerk, Harvey, to make the contract, on which the plaintiffs seek to make the defendant liable—that there is no evidence of previous authority given to the clerk, and no evidence of a ratification of what the clerk did; and the second, that the defendant is, at all events, not liable, as the case is not brought within the Statute of Frauds. As to the last point, we are all agreed that the case is not within the Statute of Frauds. The note to 1 Wms. Saund. 211, correctly lays down the law. The fair result of the authorities is there stated to be, “that the question, whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant, or his property, except such as arises from his express promise.” Now, I quite concur in that doctrine, provided that the proposition is considered as qualifying what comes before in that note, and which part of the passage has commonly been lost sight of by persons arguing these cases. If there is something more than a mere undertaking to pay the debt of another—if the property, in consideration of the giving up of which the party enters into the undertaking, is, in fact, his own, or property which he has an interest in—then the case is not within the statute, which must be taken to relate to an undertaking to pay, where the person making the collateral promise has no interest in the property himself. Therefore I quite agree with my Brothers that there is here no case within the statute. The property, which had been parted with by the plaintiffs to Haakman, he again had parted with to Schenck, and Schenck had sold it to the defendant; therefore the property was the property of the defendant, subject to the plaintiffs’ “right to retain possession till their claims were satisfied.” The defendant, therefore, had a property in these goods, subject to the plaintiffs’ lien; and so the case comes within the qualifying part of the sentence in the note to 1 Wms. Saund. 211 e, to which I have alluded. I regret to find myself unable to agree with my Brothers on the question, whether there was any evidence of authority for making the contract in the defendant's clerk. Now, the finding of the jury, as it appears to me, proves that there was a promise actually made by the defendant's clerk, the jury having believed the plaintiffs’ and not the defendant's witnesses. That, therefore, being, in fact, as it must be taken, viz. that the clerk did enter into the contract in question, then, I say, that when you take that, coupled with the other fact, that the defendant had a most pressing necessity for these goods, and the

further fact, that he or his managing clerk, Dumas, sent Harvey for the delivery order, with orders "to follow up the matter" and get the order, though that did not certainly, as seemed to be contended for the plaintiffs, give him such an authority as implied his right to obtain the delivery order by any means whatever, still, with the greatest possible deference to others, I think that it is impossible not to come to the conclusion, and draw the inference, that the clerk, so returning to the defendant's counting-house, could not have so come back without mentioning the circumstances which had taken place. This is a result which is so probable—I may say so absolutely necessary—to have happened, that the jury were warranted, in my opinion, in saying that what the clerk had done had been ratified by the defendant, or, at all events, by the defendant's managing clerk, Dumas. I think, therefore, there was evidence—not strong evidence—but fair evidence for the jury, as a matter of inference, that the defendant had ratified as they have found.

WILLIAMS, J.—I think that this case is not within the Statute of Frauds. The facts, as it appears, were, that when the promise in question was made, the defendant was substantially owner of these goods, but that these goods were subject to a lien for the purchase-money due to the original vendors, who had them in their possession. The defendant, in order to get rid of that which he feels to be an encumbrance, buys off the lien at the price of that lien. I think a promise for this purpose, and in these circumstances, is not within the Statute of Frauds. *Williams v. Leper*, and that class of cases, proceed upon the principle, that in them the defendant had an interest in the property which the landlord had distrained; and the defendant's promise, therefore, was taken to be a promise to pay the debt, to which that property, being his own, was subject, and not a mere promise to pay the debt of another. This view is in accordance with *Castling v. Aubert and Anstey v. Marden*, 2 N. R. 124, and shows this case not to be within the statute. On the other point I have the misfortune to differ from my Lord. The facts are, that the boy Harvey, whether he was authorized to make it or not, did, in fact, make the promise in question, that the defendant should pay for the goods, which is relied on by the plaintiffs; and the question is, whether, having made that promise, he made it with authority or not? Now, there is no evidence that Dumas, the defendant's managing clerk, ever knew the promise to have been made at all; but it is said that the jury were justified in inferring that this boy, Harvey, made a communication of what had taken place to Dumas, and that the latter authorized him to go back and act as he did, and ratified what he had done by sending a check to Messrs. Dale, Morgan & Co., in accordance with the representations which Harvey had made; and that as he did succeed in effecting the wishes of Dumas, by obtaining the delivery order, it is probable that when he returned to the defendant's place of business he told Dumas that he had got the order, but was forced to make the promise to pay (which he did make) as the means to get the order. That is certainly probable, as it appears to me; but then it appears to me to be probable only; but what we want is proof; that is, the thing must be legitimately proved that Dumas gave authority to Harvey to make this promise. To do that, I think more than strong probability must be shown in a case where it is absolutely necessary to show that this authority was given—in a case where the onus is on the

party, putting forward the supposition to support it; and unless you can legally infer that the promise was communicated to Dumas or the defendant before they sent the check, the argument drawn from the fact of sending the check perfectly fails; because, when the promise was made, there certainly was no term of it that stipulated that the payment should be made at any particular time. Therefore the sending the check was just as consistent with their ordinary course of business as it was with the hypothesis of the promise having been communicated to Dumas, and the check having been sent in adoption and ratification of that promise. Consequently the argument derived from the fact of the check having been sent seems to me wholly indecisive; and I must say that it seems to me very unsafe to hold, that, because there is a probability that something took place from which the jury might infer an authority to have been given, that is legal evidence of such authority having been given.

CROWDER, J.—This case, in my opinion, is not within the Statute of Frauds. On this point I agree fully in what has been laid down by my Lord and my Brother Williams, and I do not think it necessary to say more than that I do so. As to the other point, I have come to the conclusion, after much hesitation, that there was not evidence that the clerk, Harvey, was delegated to make the promise to pay. That could only be done by an authority given in the first instance, or by a ratification of his acts, given or communicated afterwards. The counsel for the plaintiffs said that Dumas gave the authority before the boy made the promise; that he was told "to follow it up" and get the order; but as to that, I agree that that was certainly not enough to show an authority given beforehand to make that promise, which is relied on by the plaintiffs. Then if there is no evidence, or not sufficient evidence, to prove an authority given previously, it rests upon the question, whether there was a ratification by Dumas of that which had been done, made after the promise was made. Now, as to the boy's evidence, we must certainly take it, after the finding of the jury, that the promise had been made as he stated, and as other witnesses stated it to have been. Still there is an absence—beyond all doubt an absence—of all evidence of positive ratification; and I must own that it appears to me there is nothing whatever of actual evidence to show an authority by ratification. I apprehend that there must be some clear evidence in such a case as ratification; such a case must not be left to rest on an inference. To enable a jury to come to the conclusion of a ratification having taken place, there must at all times, I think, be substantive evidence. Now, if the making of the check could be reasonably considered to be something done in execution of the promise, and capable of receiving no other explanation, then it might be considered that it was a confirmation of the promise, and operated to ratify the clerk's act in giving it; but as to this I agree with my Brother Williams, that when you look to what Dumas did—the evidence, not contradicted, that the check was drawn in the ordinary course of business of the house, and handed to Messrs. Dale, Morgan & Co., the brokers, in the ordinary course of business—then the sending of the check is perfectly consistent with the supposition that it was something done in the usual routine of business, wholly independent of any promise to pay. If there had been a promise to pay on a given day, or a promise to pay immediately on

the receipt of the delivery order, then the sending of the check might have been evidence to show a ratification; but here the promise is a promise merely to pay, which would have been satisfied by a payment at any time. The whole rests on probability here; and to me it certainly seems much more probable, indeed very probable, that some communication was made by Harvey to Dumas upon his return from the plaintiffs' counting-house; but still I see nothing, on the evidence, to show that Dumas ever ratified the promise.

WILLES, J.—I shall not add to what has been said by my Brothers respecting the Statute of Frauds, further than to say that it appears to me to be inapplicable to the present case. But, on the other point, I am bound to say that there appears to me to be no evidence that the defendant ever authorized or ratified this promise. If the defendant had been in Harvey's place, and the question had arisen whether he had communicated to his employer such a promise as this, the case would have been different, for this reason, that when you are dealing with the acts of a party to a contract the jury may make such inferences as may seem fit to them, and may act upon probabilities; but not so when the question is as to third parties, for then it is not competent for the jury to proceed upon any but substantial evidence as against such third persons. With respect to Harvey, all are agreed that there was no evidence at all that he was empowered, by any previous authority, to make this promise. It was not, therefore, in respect of any duty—at least in respect of any duty of perfect obligation—that he was bound to communicate what he had said to the defendant; it was no part of his employment to do so; at any rate, there was no evidence that it was. Then the maxim, "*Omnia rite acta esse præsumuntur*" has never, that I am aware of, been applied to the assumed performance of such an employment as that, which is not a duty imposed by law. But we cannot say that there was any evidence of the communication having been made to the defendant; and if it was so communicated, there still is the question how the fact of the sending the check is to be disposed of; and on that I agree with my Brother Williams, that the fact is equally consistent with its having been sent in pursuance of the ordinary course of the defendant's house of business, as with its having been sent in pursuance of the clerk's promise; and then we have the ordinary case where the consideration of evidence applies, not to come to a conclusion on facts which are equally reconcilable with each of two suppositions.

Rule absolute for a nonsuit.

TEDD and Wife v. DUGLAS. Jan. 26, 1859.(a)

In an action for injury by negligence of the defendant, the jury found a verdict for the plaintiff, with 6d. damages, though it appeared that the plaintiff had paid 4l. 10s. for surgical attendance, rendered necessary by the injury. The Court granted a new trial.

THIS case was tried at the Summer Assizes at Warwick, 1858, before Cockburn, C. J., when a verdict was found for the plaintiff, with 6d. damages. The plaintiff complained of an injury to his wife, who was

run over owing to the negligence of the defendant. The surgeon's bill for attendance, &c., was 4*l.* 10*s.*, which the plaintiff had paid.

Mundell obtained (Nov. 3, 1858) a rule to show cause why the verdict should not be set aside, and a new trial had, on the ground that the damages were insufficient, citing *Armytage v. Haley*, 4 Q. B. 917 (E. C. L. R. vol. 45), and *Gibbs v. Tunaley*, 1 C. B. 640 (E. C. L. R. vol. 50).

COCKBURN, C. J., observing, that if the plaintiff's wife was entitled to a verdict at all, in his opinion she was entitled to substantial damages, and that, as it stood, it was not a satisfactory verdict.

O'Brien now showed cause.—There is no ground to disturb the verdict. The evidence showed that the plaintiff and his wife were coming away from a public-house when the accident occurred; the plaintiff was drunk, the wife was stated to have smelt of rum; this pointed rather to negligence contributory to the accident. In *Armytage v. Haley* the new trial was only granted on payment of costs. In *Howard v. Barnard*, 11 C. B. 658 (E. C. L. R. vol. 73), the jury gave only nominal damages for an injury caused to the plaintiff by the falling of a building negligently put up, yet the court refused to grant a new trial on that ground, there being no reason to impute improper motives to the jury. Only one farthing damages was given in *Apps v. Day*, 14 C. B. 112 (E. C. L. R. vol. 78), where it clearly appeared that if the plaintiff was entitled to anything at all, she was entitled to more; yet the court refused a new trial. There can be no new trial here except on payment of costs. [COCKBURN, C. J.—That is altogether unreasonable; the woman was six weeks confined to her bed, and could not apply to her trade as a winder of silk, by which she earned from 8*s.* to 9*s.* a week. CROWDER, J.—There was a time when all new trials were granted on payment of costs; now the practice is different in some respects.]

Mundell, in support of the rule.—The costs, at most, should abide the event of the second trial, as this is a miscarriage of the jury.

WILLIAMS, J.—The rule must be absolute for a new trial, the defendant's costs to abide the event. Rule absolute.

IN THE EXCHEQUER CHAMBER.

THE MARQUIS CAMDEN *v.* BATTERBURY. *June 21, 1859.*(a)

[The syllabus and statement of facts in this case will be found ante, p. 808.]

THIS was an appeal, by the plaintiff, from the decision of the Court of Common Pleas, in favour of the defendant, on a rule to enter a non-suit pursuant to leave reserved at the trial, where a verdict was taken for the plaintiff.

Lush, for the appellant.—The defendant is liable to the payment of this rent. He became tenant to the plaintiff by payment of rent and possession of the land. He cannot divest himself of his liability by assigning over the contract. Elliott, under the agreement, was at first a tenant at will; but, after payment of rent, he became tenant from year

(a) 28 L. J. C. P. 335; 5 Jur. N. S. 1405. Coram Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., Channell, B., and Watson, B.

to year. He could then assign his interest to the defendant in the contract, and he did so. But a new tenancy was created between the plaintiff and the defendant by the defendant's paying, and the plaintiff's accepting, rent. *Buckworth v. Simpson*, 1 Cr. M. & R. 834;† S. C. 4 Law J. Rep. (N. S.) Exch. 104, is in point. [CHANNELL, B.—In that case the liability of the original tenant was gone: here Elliott's liability continues.] The liability of Elliott as tenant is gone. The defendant did not become tenant under the agreement, but a tenancy no doubt was created between him and the plaintiff on the terms of the agreement. His tenancy is determined, but his liability under the agreement remains as before.

Garth, for the respondent, was not heard.

WIGHTMAN, J.—We are all of opinion that, upon the facts of this case, the judgment of the court below is correct, and that there is no ground for implying a tenancy from year to year in the defendant. The payments which have been made by him appear to be payments under a collateral liability, namely, payments of sums upon a building contract under which Elliott was entitled to have possession of the land to build upon it. By that contract no tenancy was, in my opinion, created. The very receipts given show what the nature of the dealings between the parties was. The payments are not termed arrears of rent simply, but arrears of rent under your building agreement. The defendant stood in the place of Elliott under the terms of the building contract as his assignee. There is nothing to show that Elliott is not liable, under the covenant in the building agreement, to pay the very sum now sought to be enforced against the defendant.

ERLE, J.—I also am of opinion that this is a question of fact, and that, looking at the facts, they do not enable the plaintiff to maintain that there was a determination of Elliott's liability, or that the defendant became tenant to the plaintiff.

MARTIN, B.—I am of the same opinion. There is an agreement with Elliott that on his building the houses he shall have leases of the land granted to him. It is contended that Elliott, by payment of rent, became a tenant from year to year. Let us assume for a moment that to be so. There is a contract, in writing, between Elliott and the defendant, assigning Elliott's interest in the building agreement to the defendant. It is urged that that was not an assignment of the lease from year to year between Elliott and the plaintiff, but that a new tenancy was created as between the plaintiff and the defendant by payment of rent. But there is no evidence that the plaintiff ever agreed to any tenancy between himself and the defendant. He received the money as due under the building agreement. Further, if ever there was any tenancy from year to year it was an original tenancy by Elliott, and by him assigned to the defendant, and further assigned over by the defendant to a third person before the alleged claim of the plaintiff accrued. The case of *Buckworth v. Simpson*, which has been cited, is correctly decided, but does not apply to the present case.

CROMPTON, J.—I am of the same opinion, that this action will not lie. The plaintiff is in a dilemma. Either these payments are payments of rent or not. If these are collateral sums and not rent, the present defendant could not be liable as a tenant, for then there would be no payment of rent by him, and there is nothing else from which it has

been suggested a tenancy can be implied. But suppose that they are payments of rent upon a tenancy from year to year, or on an original demise, if the indenture to Elliott is a demise, still the defendant is not liable. This case is very distinguishable from the case where the landlord and the original lessee and assignee meet together, and where there is a surrender by operation of law of the lease to the tenant, and a fresh demise to the assignee. In all those cases the first great question is, has the original tenancy been determined? Here, the liability of Elliott has not in any way been determined. I do not agree with Mr. *Lush*, that we can separate the liability of Elliott as tenant from his liability to pay money under the building agreement. The building agreement must be looked at to see, as a matter of fact, whether a tenancy was intended to be created. It is impossible to suppose that the plaintiff ever intended to release Elliott and to make a new tenancy, which would include the discharge of Elliott. There was nothing from which, in point of law, or, as I think, looking at it as a matter of fact, from which we can imply the existence of a new tenancy in the defendant. All the payments made by the defendant are payments in discharge of Elliott's liabilities. I cannot imply a new tenancy while the old liability exists.

BRAMWELL, B.—The plaintiff does not show that the defendant was to pay rent for the land. One might, perhaps, have inferred a tenancy from the payment of the money had nothing else appeared. But it turns out that the defendant occupied under the permission originally given to Elliott, whether that created a tenancy in him or not. It is conclusive to my mind, that Elliott still is liable for the very sums of money in respect of which the action is brought. There is no evidence of any promise by the defendant to pay rent to the plaintiff.

Judgment affirmed.

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AGREEMENT.

Construction of.

1. A. having an estate for sale which he conceived might be more advantageously disposed of in connection with a patent-right possessed by B., a negotiation took place between them which resulted in the following proposal from B.:—"I give A. full liberty to make use of my patent-right for the jug, in his advertisement for the sale of the Arley works, upon the recognised condition, that, if the works are sold, I am to

receive 1000*l.*," &c. This proposal was assented to by A., and the patent was tendered to him, but he required an assignment, and B. not being willing to make an assignment, the negotiation went off. The estate without the patent-right was afterwards conveyed to a company which A. was instrumental in forming, and in which he became a shareholder:—Held, that the event upon the happening of which B. was to be entitled to the 1000*l.* had never happened. *Polly v. Sydney*, 679

2. B. requiring an advance of 50*l.* to pay the stamp-duty on the patent, and one S. being willing to lend him that sum if A. would become surety for it, A. wrote as follows;—"If B. will get his friend S. to advance the 50*l.* for the completion of the patent, I will give him or S. the 50*l.* on the patent being handed over to me." The 50*l.* was accordingly advanced by S. and the patent was afterwards tendered to A., but he declined to accept it; and S. having sued him for and recovered the 50*l.*, he brought an action against B., for money paid to his use:—Held, that A. was entitled to recover the 50*l.*; and that the refusal of the judge to put it to the jury whether the money was advanced by S. for the joint purpose of A. and B., did not amount to misdirection. *Id.*
3. The defendants contracted to buy of the plaintiff "115 bales, containing 18,440 (or any less number that may arrive) East India hides, shipped per Ontario, Calcutta to Hamburg, and to be delivered at 9*½*d. per lb. round, but the wrappers to be charged at 8*½*d. per lb." The ship having been compelled by

stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, and were sold. The remaining 97 bales arrived, but the defendants refused to accept them:—Held, that the words “or any less number that may arrive,” applied to the number of bales, and not merely to the number of hides, and consequently that the defendants were liable for not accepting the 97 bales. *Beckh v. Page*, 708

4. By articles of agreement under seal, the plaintiff covenanted with one E. that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereafter agreed and covenanted to be by him built upon the land thereafter described and agreed to be demised, &c., by indenture, demise and lease unto E., his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th of September then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one-sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of a peppercorn only. The articles then contained a covenant by E. with the plaintiff to pay the rent thereinbefore agreed to be reserved, and to pay rates, &c., to erect the messuages; and also a covenant, that, until the land and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E., his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the lease to be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff in case the whole or any part of the said yearly rent or rents thereby or by the said leases so to be granted as aforesaid to be reserved, should be behind or unpaid for twenty-one days.

In January, 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W.:—

Held, that neither E. nor the defendant acquired any estate in the premises under the building agreement; nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums. *The Marquis of Camden v. Batterbury*, 808

[Evidence of.]

5. A., the importer of certain goods, parts with the property in them, by a contract of sale to arrive, to B.; then B. sells to C.; these sales being effected by one broker; and C., being desirous of getting possession of the goods, applies to A., who on their arrival retains possession of them for a delivery order; this he is told he cannot have except on handing over a check for the price due to A., or thereabouts; he then, or his managing clerk, sends another clerk, a boy of sixteen, with orders to follow it up, and he, upon being told that the delivery order cannot be given except as against a check, promises that the defendant will pay, and so obtains the order, and a check, for a sum which covered the much larger proportion of the price, was sent the next day to the broker. It was in evidence, however, to be the usual practice of the defendant's house of business to send out a check against a delivery order, and it was expressly denied, and not contradicted, that the defendant or his managing clerk gave any authority to the boy to make the promise:—Held, that there was not sufficient evidence for the jury to draw an inference from, that the promise to pay was authorized or ratified by the defendant. *Fitzgerald v. Dressler*, 885
6. In such case, the time for B.'s payment to A. of the price agreed on not having arrived when C. applied for the delivery order, his promise to pay for the goods, if A. would take off his lien, would not have been a promise to pay for the debt, default, or mis-carriage of another, within the Statute of Frauds, so as to require a note in writing to validate it. *Id.*]

ALPHOUSE LICENSE.

See LICENSE.

APPEAL.

See COUNTY COURT.

APPRENTICE.

Binding by a Charitable Society.

1. The defendant, upon the apprenticing of his son to the plaintiff by a charitable society, agreed to give the plaintiff, in addition to a premium of 20*l.* to be paid by the society, four I. O. U.s for 5*l.* each, payable at intervals of a year. The boy was ap

prenticed, and served the full term,—the indenture stating the consideration to be 20*l.*, paid by the society. After the expiration of the term the plaintiff sued the defendant upon his I. O. U. :—

Held, that the transaction was not a fraud upon the society. *Westlake v. Adams*, 248

Statement of Consideration.

2. Held also, by Willes, J., and Byles, J.,—dissentiente Williams, J.,—that the circumstance of the indenture being void by the 39th section of the 8 Ann. c. 9, for not truly setting forth the consideration, did not prevent the plaintiff from suing the defendant upon the I. O. U.,—the execution of the indenture (though void) being a sufficient consideration for the defendant's promise to pay the additional 20*l.* *Westlake v. Adams*, 248

ARBITRAMENT.

(Compulsory Reference under 17 & 18 Vict. c. 125, s. 3.

Costs.—Where a cause was referred by judge's order under the 3d section of the Common Law Procedure Act, 1854, to a county court judge,—Held, that the costs of the proceedings before him were taxable, not under the county court scale, but in the same manner as if the reference had been to a master or to an arbitrator chosen by the parties. *Edwards v. Edwards*, 536

[*See also COSTS*, 5.]

ARREST.

See CAPIAS.

ASSURANCE.

See INSURANCE.

ATTORNEY.

Right to Costs.

1. A solicitor, pending a suit in Chancery, received from A., his client, in 1846, his bill for costs already incurred, upon an agreement with A., to refund the amount to him in the event of his obtaining a decree for costs in the suit. A. became bankrupt in 1847, and shortly after obtained his certificate, and died. The suit proceeded (the assignees not interfering), and a decree was pronounced under which the costs were awarded to A., and were received by the solicitor.

In an action against the solicitor by the assignees of A.,—Held, that the contingent right to have the amount advanced by him for costs repaid under the agreement (which was a valid agreement, and made upon a sufficient consideration), was an interest in A., which on his bankruptcy passed to his

assignees; and consequently that the latter were entitled to recover the sum so paid by A., as money received to their use. *Morgan v. Taylor*, 653

2. *Quere*, whether A. at the time of his bankruptcy had such an inchoate or contingent interest in the costs of the suit, *as such*, as would pass to his assignees? *Id.*
3. By the decree, the solicitor, in addition to the sum paid to him by A. in 1846, received a further sum for costs due to a former solicitor in the suit:—Held, that the assignees were not entitled to recover this sum,—although it appeared that no claim had been made thereto by such former solicitor. *Id.*

Duty of, as to Custody of Client's Deeds.

4. It is no answer for an attorney, when sued in detinue for a deed which has been intrusted to him by a client, to say simply that he has lost it. *Reeve v. Palmer*, 84, 91

BANKRUPT.

What passes to the Assignees.

1. A solicitor, pending a suit in Chancery, received from A., his client, in 1846, his bill for costs already incurred, upon an agreement with A., to refund the amount to him in the event of his obtaining a decree for costs in the suit. A. became bankrupt in 1847, and shortly after obtained his certificate, and died. The suit proceeded (the assignees not interfering), and a decree was pronounced, under which the costs were awarded to A., and were received by the solicitor.

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2. *Quere*, whether A. at the time of his bankruptcy had such an inchoate or contingent interest in the costs of the suit, *as such*, as would pass to his assignees. *Id.*
3. By the decree, the solicitor, in addition to the sum paid to him by A. in 1846, received a further sum for costs due to a former solicitor in the suit:—Held, that the assignees were not entitled to recover this sum,—although it appeared that no claim had been made thereto by such former solicitor. *Id.*

Debt provable.

4. *Contingent liability.*—In July, 1850, A. and B. gave C. a guarantee (continuing) for 200*l.*, for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the

contrary." Goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200l. was due in respect thereof. In June, 1853, B. became bankrupt, and duly obtained his certificate:—Held, by the Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that B.'s liability upon this guarantee was not a "contingent liability" within the 178th section of the 12 & 13 Vict. c. 106, and consequently that his certificate was no bar to a claim in respect of goods supplied to D. after the bankruptcy of B. *Boyd v. Robins*, 597

Certificate.

5. *Security given to forbear opposition to.*—The 5 & 6 W. 4, c. 41, s. 1,—reciting, that, by the 6 G. 4, c. 6, s. 125, it was enacted that, "any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue and give that act and the special matter in evidence," and that "securities and instruments made void by virtue of the recited act are sometimes endorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given, and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice,"—repeals the recited act, and then proceeds to enact that "nevertheless every note, bill, or mortgage which if this act had not been passed would by virtue of the recited act have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration," and the said act "shall have the same force and effect, which it would have had if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such act had provided that any such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."

The 202d section of the 12 & 13 Vict. c. 106, re-enacts in substantially the same terms the 125th section of the 6 G. 4, c. 16:—

Semble, that the same construction must be put upon the 202d section of the 12 & 13 Vict. c. 106, as the legislature had by the 5 & 6 W. 4, c. 41, put upon the 125th section of the 6 G. 4, c. 16. *Goldsmid v. Hampton*, 94

6. But,—held, that that section does not apply to a bill accepted by the bankrupt in blank before, but not dated or drawn until after, the allowance of his certificate. *Goldsmid v. Hampton*, 94

Deed of Arrangement under 12 & 13 Vict. c. 106, ss. 224 et seq.

7. To an action against them as the acceptors of a bill of exchange, the defendants pleaded a plea founded upon a deed of arrangement made by the defendants with their creditors, under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which had not been signed by the plaintiff, but which was said on the part of the defendants to be nevertheless binding on him by reason of its being executed by six-sevenths in number and value of their creditors.

The instrument was not a composition deed; but it contained a clause by which each of the creditors *parties to or bound by the deed* covenanted not to sue, impede, or molest the defendant: and then followed another clause, to the effect, that, if any creditor *by whom or on whose behalf the deed should have been actually executed*, should act contrary to that covenant, the defendant should be absolutely discharged from all claims and demands both at law and in equity, by such creditor:—

Held, that this latter clause was not binding upon the plaintiff,—it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. *Legg v. Chessbrough*, 741

BARON AND FEME.

See HUSBAND AND WIFE.

BILL OF EXCHANGE.

Joint and Several Note.

A joint and several promissory note of A. and three others may be set off against a claim of A. in an action by him against the payee upon a money demand. *Owen v. Wilkinson*, 526

And see BANKRUPT, 6.

BOROUGH.

Within 9 G. 4, c. 61, s. 1.

A borough may be a "town corporate" within the licensing act, 9 G. 4, c. 61, s. 1, though it has no separate Court of Quarter Sessions. *Brown, app., Nicholson, resp.*, 468

BOTTLE ENVELOPES.

See LETTERS PATENT.

BROKER.

Consequences of Acting without a License.

Although an unlicensed person who assumes

to act as a broker (in London) in the buying of shares in a public company, is, by reason of the statute 6 Ann. c. 16 incapacitated from suing for commission,—Held, by the Exchequer Chamber,—dissentiente Crompton, J.,—that he may still recover money which by the usage of the share-market he has been obliged to pay to the seller as the price of the shares; there being nothing to show that the payment was made in pursuance of any *illegal contract*, or that it was a necessary part of the duty of a broker, *as such*, to pay the money. *Smith v. Lindo*, 587

BUILDING AGREEMENT.

Construction of,—See AGREEMENT.

CAPIAS.

Under 1 & 2 Vict. c. 110, s. 3.

1. It is no ground for rescinding an order for a *capias* under the 1 & 2 Vict. c. 110, s. 3, that the plaintiff, when he comes to declare, may have to rely upon a cause of action different from that stated in the affidavit upon which the order was obtained. *Burns v. Chapman*, 481
2. The court will only interfere where it clearly appears that the obtaining the order is an abuse of its process. *Id.*

CERTIFICATE.

See BANKRUPT, 5, 6.

CERTIORARI.

See COUNTY COURT.

CHARTER-PARTY.

See SHIPPING, 1.

COMMISSION.

For taking an Acknowledgment under 3 & 4 W. 4, c. 74.

See HUSBAND AND WIFE, 1—4.

COMMON LAW PROCEDURE ACT, 1854.

Section 3.—Costs of reference to county court judge.

See COSTS, 4.

Section 22. *Discrediting Witnesses.*

See EVIDENCE.

COMPROMISE.

See COUNSEL.

COMPULSORY REFERENCE.

See ARBITRAMENT.

CONDITION PRECEDENT.

What amounts to.

By an agreement between the plaintiffs of the first part and the defendants of the second part the former agreed, that upon payment to them by the latter of 1440*l.* by instalments on certain days, they would grant the defendants a lease of a certain parcel of land; and the defendants agreed to accept such lease and execute a counterpart thereof. A declaration after setting out the agreement verbatim,—alleged that all things and conditions had happened and had by the plaintiffs been observed and performed which were necessary to entitle them to be paid by the defendants the several sums on the days named, and that the said several days had elapsed before the suit; and assigned for breach non-payment of the moneys or any part thereof:—Held, that the declaration disclosed a sufficient cause of action,—the granting of the lease not being a condition precedent to the plaintiffs' right to demand payment of the money. *Baggalay v. Pettit*, 637

And see NEGLIGENCE, 3.

CONSIDERATION.

See APPRENTICE, 2.

CONTINGENT INTEREST.

See BANKRUPT, 1—3.

CONTINGENT LIABILITY.

See BANKRUPT, 4.

COSTS.

Concurrent Jurisdiction.

1. A temporary or compulsory residence, at the time of the commencement of an action, in a gaol does not constitute the place of detention the "dwelling" of the party, within the 128th section of the 9 & 10 Vict. c. 95. *Dunston v. Paterson*, 267
2. The court will require a strong case to be made out before they will overrule the exercise of a judge's discretion under the 15 & 16 Vict. c. 54, s. 4. *Id.*
3. The plaintiff having recovered only 5*l.* in an action for false imprisonment, and the judge having declined to certify under the County Court Act, 15 & 16 Vict. c. 54, s. 4,—Held, that the plaintiff was equally disentitled to the costs of a demurrer upon which she obtained judgment, as to the costs of the issues of fact. *Id.*

Of Reference to a County Court Judge under 17 & 18 Vict. c. 125, s. 3.

4. Where a cause was referred by judge's order under the 3d section of the Common Law Procedure Act, 1854, to a county court judge,—Held, that the costs of the proceedings before him were taxable, not under the county court scale, but in the same manner as if the reference had been to a master or to an arbitrator chosen by the parties. *Edwards v. Edwards*, 536

[Of Different Issues.]

5. Upon a reference of all matters in difference in a cause, the costs to abide the event of the award, the party in whose favour the action is decided by the award is entitled to the costs of the cause, although some of the issues may be found in favour of the other party. *Reynolds v. Harris*, 872
6. To one of several counts in an action of slander the defendant pleaded a multifarious plea of justification, setting forth a series of statements of facts, any one of which was a sufficient answer to such count. Upon a reference of the cause, the arbitrator found that one of such statements in the plea was true, and that the others were untrue. The finding on the issues as to another count was for the plaintiff, who had the general costs of the cause:—Held, that the finding on the part of such plea to be untrue was not a finding of an issue for the plaintiff within the 81st section of the Common Law Procedure Act, 1852, or of the rule Hil. Term, 2 Will. 4, r. 74, and that the plaintiff was, therefore, not entitled to the costs of the issue on such plea. *Id.*
7. Held, further, that the defendant was entitled to the costs of so much of the plea as was found in his favour, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not to the costs of any evidence applicable only to that part of the plea which was found to be untrue. *Id.*
8. The correctness of the decision in *Biddulph v. Chamberlayne*, 17 Q. B. 351 (E. C. L. R. vol. 79), questioned. *Id.*

Contingent right to,—See *BANKRUPT*, 1.

Set-off of,—See *SET-OFF*.

COUNSEL.

Compromise of Action by.

Where a cause is compromised by the counsel and attorneys, in court, in the presence of the client, and after conference had with him with a view to an arrangement, and the client do not dissent, and the terms of the compromise have been embodied in an order of Nisi Prius, subsequently made a rule of court, the arrangement will not be disturbed,

upon a suggestion by the client, that, though present when it was made, he did not understand what was going on. *Chambers v. Mason*, 59

COUNTY COURT.

Appeal.

Death of judge.—The plaintiff having obtained a verdict in a county court, the defendants gave notice of appeal under the 13 & 14 Vict. c. 61, s. 14, and the parties being unable to agree upon a case, one drawn by each party was duly submitted to the judge to settle and sign, but, before this was done, the judge died. The court,—without deciding whether or not execution might issue,—refused to grant a prohibition to restrain the new judge from proceeding upon the judgment, or a certiorari to remove the cause. *M'Cullum v. Cookson*, 498

Concurrent Jurisdiction,—See *COSTS*, 1, 2, 3.

Reference to Judge of,—See *ARBITRAMENT*.

COVENANT.

What amounts to a Covenant.

An indenture made between the plaintiff and defendant recited that the former was seised or entitled to certain hereditaments and premises, subject to a mortgage and further charge, that he was indebted to the defendant in the sum of 100*l.* for goods sold and delivered, that the defendant had commenced an action against him to recover the same, and that the plaintiff, being desirous of staying the action and of securing to the defendant the payment of his debt, had proposed and agreed to convey the hereditaments and premises to him, subject to the encumbrances, upon certain trusts for securing the same. It then recited as follows,—“and it has also been agreed between the [plaintiff] and [defendant] that he the [defendant] shall be at liberty to sign judgment in the said action so commenced against the [plaintiff] as aforesaid, but that no execution shall issue thereon until this present security be realized.” The indenture then proceeded to convey the premises to the defendant upon certain trusts:—Held, that the latter recital amounted to a covenant by the defendant not to issue execution until the realization of the security. *Farrall v. Hilditch*, 840

CRIPPLEGATE TITHE ACT.

See *ECCLIASTICAL LAW*.

CUSTOM.

Evidence of.

In an action for a trespass in passing over the plaintiffs' barge moored to a wharf in a navi

gable river, there was evidence of a custom for barges or other vessels arriving at a wharf for the purpose of loading and unloading, to pass for that purpose over any other barge or vessel moored alongside a wharf, and thereby preventing access to it otherwise:—*Quære*, whether such custom applied to a thing like this, which was a mere landing-stage for steamboat passengers. *The Eastern Counties Railway Company v. Doring*, 821

CUSTOMARY MANNER.

See SHIPPING, 1.

[DAMAGES.

Insufficient,—*See NEW TRIAL*, 2.]

DEEDS.

Detinue for,—*See DETINUE*.

Recitals,—*See COVENANT*.

DEMURRER.

Costs of,—*See COSTS*, 3.

DETINUE.

Where it lies.

It is no answer for an attorney, when sued in detinue for a deed which has been intrusted to him by a client, to say simply that he has lost it. *Reeve v. Palmer*, 84, 91

DEVISE.

Construction of.

I. Testator devised to a younger son, as follows,—"All that my messuage or dwelling-house and premises, with the piece of land thereto adjoining in T. St. L., with their respective appurtenances."

Upon a special case, it was stated, that, when the testator first became possessed of the property (40 years ago), there was no fence to part the garden (No. 566 on the plan) from the land, and the parts numbered 567 and 568 formed one field, which was then called "The Five Acres;" that, about 30 years ago, he planted across it a fence, and after that called 567 "The Pear-Tree Piece," and 568 "The Second Grass Piece;" that the other pieces were in like manner separated by fences, but there was a communication with all of them by means of gates: that the turnpike-road which separated 573 and 574 was made by the trustees under an act of parliament sometime after the testator had become possessed of the property, the land being purchased by them of the testator for that purpose; and

that the testator used to call the different pieces "grounds:"—

Held, that the devise was not confined to "The Pear-Tree Piece," but included the other contiguous closes up to the turnpike-road. *Josh v. Josh*, 454

2. *Quære*, whether it did not also include the piece beyond the turnpike-road. *Id.*

DISTRESS.

See LANDLORD AND TENANT, 2, 3.

DOUBLE VALUE.

See LANDLORD AND TENANT, 1

DUMMY.

See TRESPASS.

DWELLING.

See COSTS, 1.

ECCLESIASTICAL LAW.

Parochial Districts.

The church of St. Bartholomew, Moorfields,—a church erected and endowed under the provisions of the 2 & 3 Vict. c. cvii,—was built within the limits of the parish of St. Giles, Cripplegate, and the respondent was duly presented to the incumbency thereof. By an order in council in 1850, pursuant to the 59 G. 3, c. 134, s. 16, a particular district was assigned to the church so built, within the parish of St. Giles, Cripplegate, which was called "The district chapelry of Little Moorfields," and authority was given to publish banns and to solemnize marriages, &c., in the said church, the fees for which were to be paid to the incumbent. In 1857, the vicar of St. Giles, Cripplegate, by a deed, to which the Dean and Chapter of St. Paul's and the Bishop of London were parties,—reciting a local act of 7 G. 4, c. liv., whereby the tithes of the parish of St. Giles, Cripplegate, were extinguished, and in lieu thereof an annuity of 1800*l.* subject to the averages of the price of wheat, was secured to the vicar payable quarterly,—annexed to the church of the district chapelry of St. Bartholomew, Moorfields, one-sixth part of the annual sum to which he was entitled as vicar under the 7 G. 4, c. liv., to the intent that the respondent and his successors, perpetual curates of the said district chapelry of St. Bartholomew, Moorfields, should receive the one-sixth part thereby annexed:—

Held, that the extinguishment of the tithes of St. Giles, Cripplegate, and the substitution of an annual payment, by the local act, 7 G. 4, c. liv., did not prevent the legal an-

annexation of a portion of such annual payment, under the provisions of the 1 & 2 W. 4, c. 45, s. 21. *Hughes, app., Denton, resp.*, 765

Held, also, that, although the district chapelry of St. Bartholomew, Little Moorfields, had, by force of the provisions of the 19 & 20 Vict. c. 104, s. 14, become a separate and distinct parish for ecclesiastical purposes, the church of St. Bartholomew, Moorfields, still remained a church to which a district had been assigned, locally situate within the limits of St. Giles, Cripplegate, and was therefore capable of receiving the annexation made under the provisions of the 1 & 2 W. 4, c. 45, s. 21. *Id.*

The 21st section of the 1 & 2 W. 4, c. 45, enacts that "the incumbent for the time being" of the district church "shall have all the same remedies for recovering and enforcing payment of the premises which shall be annexed" (including the case of the annexation of a part of the vicar's annual revenues) "as the rector or vicar for the time being of the rectory or vicarage might have had if such annexation had not been made." And by the 3d section of the local act, 7 G. 4, c. liv., the vicar is empowered, "in case any quarterly payment of the annual sum of 1800*l.*, or any part thereof, shall be in arrear and unpaid for twenty-eight days," to obtain a warrant to levy the same on the goods of the churchwardens or any one or more of the inhabitants of the parish:—Held, that the incumbent of the district church had the like power of distress for the portion of the annual sum so annexed. *Id.*

EQUITABLE DEFENCE.

See PLEADING, 2.

EVIDENCE.

Discrediting or contradicting the Party's own Witness.

1. A witness whose testimony turns out to be unfavourable to the party calling him is not therefore an "adverse" witness within the meaning of the 22d section of the Common Law Procedure Act, 1854. *Greenough v. Eccles*, 786
2. To make him an "adverse witness," so as to entitle the party calling him to contradict him by other evidence showing that he has made at other times a statement inconsistent with his present testimony, he must in the opinion of the presiding judge be adverse in the sense of showing a hostile mind. *Id.*
3. *Scmble*, that, whether adverse or not, is for the judge and not for the court to determine. *Id.*

And see FISHERY.

EXECUTION.

Effect of taking Defendant in execution.—See SET-OFF.

EXECUTORS AND ADMINISTRATORS.

Authority of.

Where a plaintiff has died since the trial,—*semble*, that a rule for a new trial cannot be moved for without letters of administration being first taken out. *Lloyd v. Ogilby*, 667

FERRY.

Disturbance of.

In an action for an evasion of the plaintiffs' ancient ferry, by carrying passengers across the river near thereto,—the court refused to allow the defendants to add a plea alleging a variety of circumstances to show, that, from the altered state of the neighbourhood, public convenience required that which the defendants had done,—holding that the plea was clearly bad, and at the most amounted to a plea of not guilty. *Newton v. Cubitt*, 627

FISHERY.

Evidence of.

The corporation of Orford claiming the exclusive right of fishery in Orford Haven, their lessees brought an action against two fishermen for an invasion of that right.

The evidence offered on the part of the plaintiffs consisted of a charter of Queen Elizabeth, dated in 1569, confirming all former charters of the corporation, and giving them power to make by-laws for the preservation of the fish in the haven,—a statute of 27 Eliz. c. 21, for the preservation of Orford Haven, and a private act of 31 Eliz. c. 1, confirming the former act, in both of which mention was made of the interest of the corporation,—the record in an action brought by the corporation in 1792, against a fisherman for *dredging for oysters* in their water, in which the corporation succeeded in establishing their right to the *oysters*,—a book kept by the chamberlain of the corporation containing entries from 1792 downwards of various sums paid by inhabitants of Orford, as well as by strangers, for licenses to fish in the haven for "floating fish,"—and oral testimony showing that the corporation had from that period down to the present time claimed the exclusive right to the floating fish within the limits of the haven, and had on many occasions obstructed and prevented unlicensed persons from fishing therein:—

Held, that the jury were warranted in finding upon this evidence that the corporation had the right claimed; and that the plaintiffs' case was not displaced by evidence on

the other side that a great number of persons had constantly fished without licenses, though repeatedly warned off. *Mannall v. Fisher*, 856

FIXTURES.

See LANDLORD AND TENANT, 4. NEGLIGENCE, 4, 5.

FLOATING FISH.

See FISHERY.

FRIVOLOUS ACTION.

See PRACTICE, 4.

GAOL.

See COSTS, 1.

GUARANTEE.

See BANKRUPT, 4.

HAWKER.

Sale of Wares in a Market.

To entitle a party to exemption from penalties for an offence against the Hawkers' Act, 50 G. 3, c. 41, on the ground that the place where he exposed his wares for sale was a public market, it must be shown that it was a legally established market,—by grant from the Crown,—and not merely a market *de facto*. *Benjamin v. Andrews*, 299

HOLDING OVER.

See LANDLORD AND TENANT, 1.

HUSBAND AND WIFE.

Acknowledgment under 3 & 4 W. 4, c. 74, s. 85.

1. *Enlarging time for return of commission.*—The court will enlarge the time for returning a commission for taking the acknowledgment of a married woman abroad, under the 3 & 4 W. 4, c. 74, where, by reason of the remoteness of the residences of the parties, the time allowed has proved too short. *In re Anna Booth*, 540

2. *Identification of Commissioners.*—A commission was given to "William Bates, lawyer, John Hovey, wholesale grocer, and Alexander Cummins, wholesale grocer, all of Dubuque, in the state of Iowa, in the United States of America." The certificate of acknowledgment was signed by "Andrew Cummins and John Hovey." The affidavit of verification was made by Hovey, who described himself as one of the commissioners, and stated that the certificate was signed by Andrew Cummins, "the other commissioner." An affidavit was produced, made by the soli-

citor who prepared and sent out the commission, who stated that "he verily believed that the said Andrew Cummins and John Hovey who signed the certificate of acknowledgment, and the said John Hovey who made the affidavit of the due taking thereof, were the persons to whom the commission was intended to be directed."—The court refused to allow the documents to be received and filed without a further affidavit by some person acquainted with the place, who could more clearly identify the parties for those intended. *In re Anna Booth*, 541

3. *Affidavit of verification.*—There being sufficient upon the documents reasonably to satisfy the court that the commission had been *bona fide* executed,—the court permitted them to be received, though the notarial certificate did not in terms verify the signature of the justice of the peace before whom the affidavit of verification purported to be sworn. *In re Charlotte Foster*, 544

4. *Notarial certificate.*—It is no objection that the notarial certificate is on paper instead of parchment. *In re Elisabeth Cook*, 543

Conveyance of the Wife, under 3 & 4 W. 4, c. 74, s. 91.

5. By a marriage settlement made in 1844, certain property of the intended wife was conveyed to trustees upon trust to permit the husband to receive the rents and profits during the coverture, or until the wife should by writing under her hand otherwise direct or appoint, and, from and after such direction or appointment, upon trust for the separate use of the wife. The deed also contained a power of sale, to be exercised "at the request and by the direction (in writing) of the husband and wife." The husband received the rents and profits down to the year 1851, when the wife exercised her power of appointment by directing the trustees to receive the rents, &c., and to apply them to her separate use. In 1852, the husband went to Australia:—Held, not a case for an order to dispense with the husband's concurrence in a deed for the conveyance of the property, under the 3 & 4 W. 4, c. 74, s. 91. *In re Mary Eden*, 232

ILLEGAL CONTRACT.

See BROKER.

INFRINGEMENT.

See LETTERS PATENT.

INSURANCE.

On Profits.

1. Where "profits" are insured against perils of the sea, the liability of the underwriters does not attach unless the goods themselves

are lost by a peril insured against. *Chope v. Reynolds*, 642

2. A. bought goods of B., to arrive at Bristol by the ship *James Daly*, from the west coast of Africa, and effected an assurance with C. against the ordinary perils, with a memorandum endorsed on the policy, declaring the insurance to be "on profit on palm oil, valued at, &c., per *James Daly*." The *James Daly*, while on her voyage to Bristol with the oil on board, was lost by a peril insured against, but the oil was brought home undamaged by another vessel, and was sold by B. to a third person:—Held, upon the authority of *The Royal Exchange Assurance v. M'Swiney*, 14 Q. B. 646 (E. C. L. R. vol. 68), that there had been no such loss of the subject-matter of insurance as was contemplated by the policy. *Id.*

INTERESSE TERMINI.

See LANDLORD AND TENANT, 1.

INTERROGATORIES.

Under 17 & 18 Vict. c. 125, s. 51.

1. Interrogatories under the Common Law Procedure Act, 1854, as to the contents of a lost document, supposed to have been executed by the party interrogated, allowed upon a *prima facie* case of loss being made out by affidavit,—subject to the probably unnecessary condition that the answers were not to be used at the trial unless such evidence was given of the loss of the document as to make secondary evidence of its contents admissible. *The Wolverhampton New Waterworks Company v. Hawksford*, 703
2. In an action for calls by a public company, the plaintiff was allowed to interrogate the defendant as to "whether and when he received from A. B. any writing relating to his becoming a director or shareholder, and what had become of it, and when and where he last saw it,"—the description of the writing being nothing more than was necessary for its identification. *Id.*

IRREGULAR DISTRESS.

See LANDLORD AND TENANT, 2, 3.

JOINT STOCK COMPANY.

Drawing and Acceptance of Bills by.

1. The Port of London Shipowners' Loan and Assurance Company was amalgamated with the Sea Fire Life Assurance Society by a deed which was subsequently judicially declared to be illegal and void. By the deed of settlement of the latter company the directors were authorized to draw and accept bills for the purposes of the company. The plaintiffs had before the so-called amalgamation effected a policy with the Port of London Company, upon which they sustained a loss, in satisfaction of which the directors of the Sea Fire Life Society, after the amalgamation, gave them a bill drawn by them upon their cashier:—
Held, that the latter company were not liable upon this bill, it not having been drawn for the legitimate purposes of the company, and the plaintiffs being bound to take notice of the deed of settlement, and therefore cognisant of the want of authority in the directors to draw the bill. *Balfour v. Ernest*, 601
2. Service of a writ of summons upon a director of a joint stock company (limited), registered under the 19 & 20 Vict. c. 47, is not good service,—writs of summons not being within the 53d section of that act, but the service thereof upon joint stock companies being regulated by the 16th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. *Towne v. The London and Limerick Steam-Ship Company (Limited)*, 730

LANDING-STAGE.

See TRESPASS.

LANDLORD AND TENANT.

Double Value, under the 4 G. 2, c. 28, s. 1.

1. The remedy for double value given by the 4 G. 2, c. 28, s. 1, against a tenant wilfully holding over after the determination of the term, and after demand and notice in writing, is given only to the lessor and landlord, or the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term,—such new lessee having no estate, but a mere *interesse termini*. *Blatchford, app., Cole, resp.*, 514

Irregular Distress.

2. A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorize him to seize, unless he ratifies the broker's act, with knowledge of what he has done; but he is responsible for any irregularity by the broker in dealing with the distress which he was authorized to make,—as, for selling the goods without notice of the distress, and without appraisement. *Haeeler v. Lemoyne*, 530
3. A., who received the rents and generally managed the property of B., in B.'s name, but without authority from her, signed a warrant to distrain the goods of C., a tenant, for rent in arrear, and, after the goods had been distrained, informed B. thereof, who there-

upon said that she should leave the matter in his hands:—Held, sufficient evidence that the distress was authorized or ratified and adopted by B. *Haseler v. Lemoyne*, 530

Fixtures.

4. *Right of severance.*—An outgoing tenant has no right to enter for the purpose of severing or removing fixtures after the expiration of his term, and a new tenant has been let into possession. *Leader v. Homewood*, 546

5. *Quare*, whether a tenant holding over at sufferance would be entitled to remove fixtures? *Id.*

Tenancy from Year to Year.

6. By articles of agreement under seal, the plaintiff covenanted with one E. that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereafter agreed and covenanted to be built by him upon the land thereafter described and agreed to be demised, &c., by indenture demise and lease unto E., his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th of September then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one-sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of a peppercorn only. The articles then contained a covenant by E. with the plaintiff to pay the rent thereinbefore agreed to be reserved, and to pay rates, &c., to erect the messuages; and also a covenant, that, until the land, and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E., his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff in case the whole or any part of the said yearly rent or rents thereby or by the said leases so to be granted as aforesaid to be reserved, should be behind or unpaid for twenty-one days. In January,

1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W.:—

Held, that neither E. nor the defendant acquired any estate in the premises under the building agreement; nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums. *The Marquis of Camden v. Batterbury*, 808

LEASE.

See CONDITION PRECEDENT

LETTERS PATENT.

Infringement.

1. The infringement of any part of a patent process is actionable, if that part is of itself new and useful, so as that it might be the subject-matter of a patent, and is used by the infringer to effect the object proposed by the patentee.

But the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent. *The Patent Bottle Envelope Company v. Seymer*, 164

2. The plaintiffs took out a patent for "Improvements in the manufacture of cases or envelopes for covering bottles," and in the specification the invention was stated to consist "in an arrangement of apparatus by which lengths of rush, straw, or other suitable material may be readily tied together, so as to form cases or covers to protect bottles from breakage when packed." It then proceeded,—“For this purpose I take equal lengths of rush, straw, or other suitable material, and confine them at one end with a ring or cap, which I then place over the neck end of a mould or mandril, corresponding in form to the bottle for which the case or cover is intended. The mould is fixed to a frame,” &c.

The defendant made bottle envelopes out of similar materials somewhat differently applied, placing them upon a model of a bottle, or mandril, and fastening the material in a manner somewhat like the plaintiffs' method:—

Held, that the use of the mandril, which was admitted to have been long commonly used for producing given forms of pliable materials, was not an infringement of the plaintiffs' patent; for, the application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject-matter of a patent. *Id.*

LICENSE.

How granted.

1. A borough may be a "town corporate" within the licensing act, 9 G. 4, c. 61, s. 1, though it has no separate Court of Quarter Sessions. *Brown, app., Nicholson, resp.,* 468
2. A license was granted by the justices of the borough of M.,—a place having a separate commission of the peace, but no separate Court of Quarter Sessions,—at a licensing meeting held on the 7th of September, which had been duly appointed by them as they had always been accustomed to do:—Held, that the license so granted was valid, notwithstanding that the justices for the county (who had concurrent jurisdiction in M.) had previously appointed a licensing meeting for the 8th. *Id.*

What is a "Traveller" within the 18 & 19 Vict. c. 118, s. 2.

3. To constitute a "traveller" within the meaning of the 18 & 19 Vict. c. 118, s. 2, it is not necessary that the party should be journeying on business. *Atkinson, app., Sellers, resp.,* 442

And see BROKER. FISHERY.

LIGHTS.

Obstruction of.

Permanent injury.—A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights, is sufficient if it show an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right. *The Metropolitan Association for Improving the Dwellings of the Industrious Classes v. Petch,* 504

MARKET.

What a Public Market within the Hawker's Act, 50 G. 3, c. 41.

To entitle a party to exemption from penalties for an offence against the Hawkers' Act, 50 G. 3, c. 41, on the ground that the place where he exposed his wares for sale was a public market, it must be shown that it was a legally established market,—by grant from the Crown,—and not merely a market de facto. *Benjamin v. Andrew,* 299

MASTER AND SERVANT.

Warranty of Servant's Competency.

1. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability. *Harmer v. Cornelius,* 236
2. When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. *Id.*

MEMORANDA.

Judges.

Resignation of the great seal by Lord Cranworth, 1
Acceptance thereof by Lord Chelmsford, 1
Resignation of Mr. Justice Coleridge, 2
Appointment of Mr. Justice Hill, 2

Attorney and Solicitor-General.

Resignation of Sir Richard Bethell and Sir Henry Singer Keating, 1, 2
Appointment of Sir Fitzroy Kelly and Sir Hugh M'Calmont Cairns, 1, 2

Queen's Counsel.

David Power, 2
Benjamin Bridges Hunter Rodwell, 600
George Markham Giffard, 600
Henry Hawkins, 600

MERCANTILE CONTRACT.

See AGREEMENT, 3.

MERCHANT SHIPPING ACT.

Construction of s. 139.

Foreign ship.—*Quere,* whether the 189th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), applies to a claim for wages earned on board an American ship? *Burns v. Chapman,* 48

MISREPRESENTATION.

See SHIPPING, 2.

MONEY PAID.

See BROKER.

NEGLECTANCE.

In navigating Ships. &c.

1. In an action to recover damages for an injury occasioned by a collision between two vessels,—Held by the Exchequer Chamber, that the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened: in the first case, the plaintiff would be entitled to recover; in the latter not, as, but for his own fault, the misfortune could not have happened. *Tuff v. Warman,* 573
2. Mere negligence or want of ordinary care or caution, will not, however, disentitle the plaintiff to recover, unless it be such, that but for that negligence or want of ordinary

care and caution, the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff. *Tuff v. Warsaw*, 573

3. The plaintiff's compliance with the regulations of the 17 & 18 Vict. c. 104, ss. 296, 298, as to porting his helm, &c., is not in such a case a condition precedent to his right to recover. *Id.*

4. The presumption that that which is annexed to the soil becomes part of the soil, may be rebutted by circumstances showing the intention of the parties to the contrary. *Lancaster v. Eve*, 717

5. The plaintiffs were possessed of a wharf on the Thames, in front of which was a pile which had more than twenty years ago been driven into the bed of the river by the then occupiers of the wharf, and had remained there without interruption from the Crown or the conservators of the river, and which was essential to the use and enjoyment of the wharf:—Held,—the fact of the ownership not being disputed,—that the court were justified in presuming that the pile had been placed there in virtue of an easement, with the consent of the owners of the soil, and that a sufficient possession remained in the plaintiffs to entitle them to maintain an action against the defendants for negligently running against and destroying the pile. *Id.*

In driving a Carriage.

6. The mere fact of a man's driving on the wrong side of the road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot. *Lloyd v. Ogleby*, 667

In the Stowage of Goods.—See SHIPPING, 2, 5.

[*Damages in.*—See NEW TRIAL, 2.]

NEW ASSIGNMENT.

See PLEADING, 3.

NEW TRIAL.

Plaintiff Dead.

1. Where a plaintiff has died since the trial,—semble, that a rule for a new trial cannot be moved for without letters of administration being first taken out. *Lloyd v. Ogleby*, 667

[*For Insufficient Damages.*

2. In an action for injury by negligence of the defendants, the jury found a verdict for the plaintiff, with 6d. damages, though it appeared that the plaintiff had paid 4l. 10s. for surgical attendance, rendered necessary by the injury. The Court granted a new trial. *Tedd v. Douglas*, 895]

NOT GUILTY.

See PLEADING, 1.

NOTARIAL CERTIFICATE.

See HUSBAND AND WIFE, 4.

NOVELTY.

See LETTERS PATENT.

ORFORD HAVEN.

See FISHERY.

PACKED PARCELS.

See RAILWAY COMPANY, 1.

PAROCHIAL DISTRICT.

See ECCLESIASTICAL LAW.

PARTNERS.

Liability of, for Goods supplied for the Firm.

1. One of the members of a foreign firm resident in this country, bought goods on account of the firm, for which he gave his own acceptances. Before the maturity of the bills, the acceptor became bankrupt, and the drawer (or those to whom he had endorsed them) proved for the amount against the acceptor's estate, and received dividends:—Held, that the vendor of the goods (to whom the bills had been returned) had done nothing to prejudice his right to have recourse against the other members of the firm for the unpaid balance. *Bottomley v. Nuttall*, 122
2. The mere fact of the vendor's dealing with the resident partner, making out the invoices to him individually, and drawing upon him alone though aware that he was a member of a firm, and that the goods were to be shipped for the firm, makes no difference. *Id.*

PATENT.

See LETTERS PATENT.

PLEADING.

Adding Pleas.

1. In an action for an evasion of the plaintiffs' ancient ferry, by carrying passengers across the river near thereto,—the court refused to allow the defendants to add a plea alleging a variety of circumstances to show, that, from the altered state of the neighbourhood, public convenience required that which the defendants had done,—holding that the plea was clearly bad, and at the most amounted to a plea of not guilty. *Newton v. Cubitt*, 627

Equitable Defence.

2. A. obtained an advance of money from a loan society upon the security of the joint and several promissory note of himself and the defendant (who to the knowledge and on the requirement of the society signed the same as surety) and of a bill of sale of A.'s furniture. Certain instalments of the note being in arrear, the lenders seized and sold the goods of A. under the bill of sale, and afterwards sued the defendant for the balance:—Held, that it was competent to the defendant to show, by way of equitable defence, that, but for the mismanagement of the plaintiffs' agents, the goods of A. would have realized sufficient to satisfy the whole debt. *The Mutual Loan Fund Association v. Sudlow*, 449

New Assignment.

3. To a declaration charging the defendant with breaking and entering upon a certain dummy or landing-stage of the plaintiffs, the same being a barge of the plaintiffs, moored to a wharf in the river Orwell, and embarking and disembarking from the same passengers and others on, to, and from divers ships and vessels, and mooring ships and vessels against the same,—the defendant pleaded that the Orwell was a public and common navigable river and common highway; that he had a right to land and was desirous of landing passengers from his steam vessel at the wharf; that the plaintiffs' dummy or landing-stage at the time when, &c., was permanently moored and fixed alongside the wharf so that his passengers could not embark or disembark there without his vessel being moored thereto and his passengers passing over the same, &c.

Issue having been taken upon the above and other pleas, the cause went down to trial, when it appeared that the dummy was moored to the wharf so as to rise and fall with the tide; that vessels could not if the dummy had not been there have approached the wharf at low water; and that the defendant claimed the right of landing at all times over the dummy:—Held, that if the plaintiffs had intended to complain of the defendant's exercise of his supposed right at times of low water, when he could not have come to the wharf if their dummy had not been there, they should have new assigned. *The Eastern Counties Railway Company v. Dorling*, 821

Plea of Tender,—See TENDER.

PRACTICE.

Process.

1. *Capias* under 1 & 2 Vict. c. 110, s. 3.]—It is no ground for rescinding an order for a *capias* under the 1 & 2 Vict. c. 110, s. 3, that the

plaintiff, when he comes to declare, may have to rely upon a cause of action different from that stated in the affidavit upon which the order was obtained. *Burns v. Chapman*, 431

2. The court will only interfere where it clearly appears that the obtaining the order is an abuse of its process. *Id.*

3. *Service of, on a joint stock company*,—See JOINT STOCK COMPANY, 2.

Staying Proceedings.

4. The defendants, being indebted to the plaintiffs to the amount of 6*l.* 8*s.* 6*d.*, but insisting that they owed only 6*l.* 3*s.* 6*d.*, sent them a banker's draft for the latter sum, payable at seven days' sight. The plaintiffs procured the draft to be accepted, but wrote to the defendants, demanding the additional 5*s.*, and telling them, that, unless it was paid, they would return the draft. The defendants still refusing to pay the 5*s.*, the plaintiffs, retaining the draft, issued a writ for the 6*l.* 8*s.* 6*d.* The court stayed the proceedings on payment of the 5*s.*, without costs. *Stuart v. Cawose*, 737

Interrogatories,—See INTERROGATORIES.

PRINCIPAL AND AGENT.

Ratification of Tortious Act of Agent,—See LANDLORD AND TENANT, 3.

PROFITS.

See INSURANCE.

PROHIBITION.

See COUNTY COURT.

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROMOTIONS.

See MEMORANDA.

QUARTER SESSIONS.

A borough may be a "town corporate" within the licensing act, 9 G. 4, c. 61, s. 1, though it has no separate Court of Quarter Sessions. *Brown, app., Nicholson, resp.*, 468

RAILWAY COMPANY.

Charges for Carriage of Goods.

1. *Packed parcels*.]—A railway company by their act of incorporation were empowered to fix the sum to be charged by them in respect of the carriage of small parcels (not exceeding 100 lbs. each) "as to them should seem proper;" but that provision was not to extend to "articles, matters, or things sent

in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which might be sent upon the railway at the same time."

By a subsequent act it was provided "that the charges by that act authorized to be made for the carriage of goods, &c., by the company, should be at all times charged equally to all persons, and after the same rate, in respect of all goods of a like description and conveyed on the same portion of the line; and that no reduction or advance should be made either directly or indirectly in favour of or against any particular company or person :"—

Held, that the company were restricted to a reasonable charge, and were not justified in making an increased charge in respect of the conveyance of "packed parcels," the jury having negatived that they incurred any additional risk or expense in the carriage thereof. *Piddington v. The South Eastern Railway Company*, 111

Injunction against, under the Railway and Canal Traffic Act, 1854.

2. It is not a legitimate ground for giving a preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question: and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business. *Buxendale v. The Great Western Railway Company*, 309
3. The complainants were common carriers from Bristol to London, using for that purpose the Great Western Railway. They were also common carriers from Bristol to various other places, using for that purpose lines in rivalry with the Great Western lines other than that from Bristol to London. One S., a paper-maker near Bristol, who was in the habit of sending large quantities of paper to London and also to the other places before mentioned, prior to August, 1857, employed the complainants to carry his paper to London and deliver it there; and the complainants employed the company to carry it on their railway from the station at Bristol (where it was delivered by S.) to the station at Paddington, whence it was carted by the complainants to its destination in London. The company's charge at that time was 22s. 1d. per ton,—being their rate for first class goods, less 1s. 6d. per ton for cartage to the station at Bristol, and 3s. 4d. per ton for cartage from the station at Paddington. The 1s. 6d. per ton was allowed to S., the paper

being delivered at the station at Bristol by him; and the complainants made their profit upon the cartage in London. In August, 1857, the company raised their charge for this paper to 35s. per ton, being their rate for third class goods, less cartage. The complainants in consequence made a proportionate increase in their charge to S., who objected to it. The company declined to alter this charge; but they subsequently agreed with S. to carry his paper from the station at Bristol to London for 23s. 4d. per ton, including cartage from Paddington,—in order, as the complainants alleged, to induce S. to send his paper through them, instead of through the complainants, as formerly.

Upon a motion for an injunction under the Railway Traffic Act, 1854, the company sought to justify this preference by alleging, that they carried for S. upon the terms of a special agreement containing stipulations so much to their advantage as to be worth the whole difference of charge; that the rate of 23s. 4d. per ton was agreed upon for paper between Bristol and London (to include cartage in London, but not at Bristol); that the paper carried at that rate was to be at the risk of S., who was also to send all other goods he had to send, at the ordinary rates, by the company, and also to send all his goods (including paper) which were going to any place to which the company carried, by them; and that it was a great gain to the company, and a fair equivalent for the difference of charge upon the goods carried from Bristol to London, to have the advantage which they derived by securing the whole of S.'s traffic, or that in which he had any interest or could influence, to the north of England and elsewhere upon their lines other than between Bristol and London, together with the advantage of the goods being carried from Bristol to London at S.'s risk :—

Held, that the advantages thus stipulated for were wholly distinct from and did not affect the price or profit of the carriage from Bristol to London, and ought not to be taken into account in determining the charge for such carriage; and consequently, that the complainants were entitled to relief. *Buxendale v. The Great Western Railway Company*,

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4. It is competent to this court, under the Railway Traffic Act, 17 & 18 Vict. c. 31, s. 2, to interfere to prevent a railway company from fixing the rate of tolls to be taken on the railway with a view to the promotion of their own interests, where their so doing subjects others to unreasonable disadvantage, or operates to their prejudice by giving undue preference to third parties. *Buxendale v. The Great Western Railway Company* (*Reading Case*),

336

5. Down to a recent period the Great Western Railway Company charged a uniform rate of 8s. 6d. per ton on all goods in a particular class conveyed on their railway between their station at Reading and Paddington. These goods were collected and delivered (principally) by the complainants at a charge of 4s. 10d. per ton. The company raised their charge for carrying goods under 500 lbs. weight to 8s. 4d. per ton,—being the aggregate of the former charge for carrying and that for collecting and delivery; with an intimation to the public that they would collect and deliver goods *free of all charges*. The real purpose of this arrangement was made apparent to the court to be, to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business, *and the profit upon it*, to themselves, as well as to exclude the complainants from competing with them in this department of business:—

Held, that the complainants were entitled to an injunction,—the above arrangement being objectionable, both as an undue preference given on the one hand, and as an unreasonable disadvantage imposed on the other; for, that it was an undue preference of the company in their separate capacity of carriers *other than on the line of railway*, inasmuch as they thereby secured to themselves the entire monopoly of the last-mentioned traffic, to the entire exclusion of the complainants and all others; and it was an undue prejudice and an unreasonable disadvantage imposed on the complainants, inasmuch as their goods and those of all persons employing them, as indeed the goods of all persons other than those who employed the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery if they were required to collect and deliver for them, or to an unnecessary charge if they required no such accommodation. *Baxendale v. The Great Western Railway Company (Reading Case)*, 336

6. The Court declined to review the above decision, under the 5th section of the 17 & 18 Vict. c. 31, upon a suggestion that it had been erroneously assumed on the argument that the collection and delivery of parcels was a source of profit,—the fact being otherwise. *Baxendale v. The Great Western Railway Company (Reading Case)*, 336

7. The court confirmed their decision in *Baxendale v. The Great Western Railway Company (Reading Case)*, *anté*, p. 336, though it appeared by affidavit that no profit was made either by the company or by the carrier upon the charges for collecting and

delivering goods for their customers at the respective stations. *Garton v. The Great Western Railway Company*, 669

8. It is competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear, that, in entering into such agreements, the company have only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them is adequate, and the company are willing to afford the same facilities to all others upon the same terms. *In re Nicholson and The Great Western Railway Company*, 386

9. Nor is the 2d section of the Railway Traffic Act, 17 & 18 Vict. c. 31, contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. *Id.*

RATIFICATION.

Of Tortious Act of Agent.—See LANDLORD AND TENANT, 3.

READINESS AND WILLINGNESS.

See TENDER.

REASONABLE TIME.

See SHIPPING, 1.

RECITAL.

See COVENANT.

REVERSIONARY INTEREST.

Obstruction of Lights.

A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights, is sufficient if it show an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right. *The Metropolitan Association for Improving the Dwellings of the Industrious Classes v. Petch*, 504

RUNNING DOWN.

See NEGLIGENCE, 1-3.

SEAMEN'S WAGES.

See SHIPPING, 6, 7.

SET-OFF.

Joint and several Promissory Note.

1. A joint and several promissory note of A. and three others may be set off against a claim of A. in an action by him against the payee upon a money demand. *Owen v. Wilkinson*, 526

Of Interlocutory Costs.

2. Taking the defendant in execution is not an absolute extinguishment of the debt, so as to preclude the plaintiff from applying to the equitable discretion of the court to set off interlocutory costs due to the defendant *in the same suit*; though (*semble*) costs due to the defendant in a separate and distinct action cannot be so set off. *Thompson v. Parish*, 685
3. The plaintiffs obtained judgment against the defendant, and took him in execution. The defendant applied to a judge to discharge him from custody on the ground of irregularities in the plaintiffs' proceedings; and the plaintiffs obtained a cross-summons for leave to amend. The two summonses were heard together, and the judge made an order "that the plaintiffs be at liberty to amend, and that they should pay to the defendant his costs of and occasioned by the application to amend, and also by the defendant's application to set aside the proceedings." The court, in the exercise of its equitable jurisdiction, ordered that the costs payable to the defendant under the judge's order (which they held to be "interlocutory costs" within the 63d rule of Hilary, 1853) should be set off against the plaintiffs' judgment,—dissenting from the law as laid down by Littledale, J., in *Beard v. McCarthy*, 9 Dowl. P. C. 136, and holding *Peacock v. Jeffery*, 1 Taunt. 526, and *Simpson v. Hanley*, 1 M. & Selw. 696, to have been overruled by *Taylor v. Waters*, 5 M. & Selw. 103. *Id.*

SEVERAL FISHERY.

See FISHERY.

SHARE-BROKER.

See BROKER.

SHIPPING.

Construction of Charter-Party.

1. By a charter-party, the vessel was to proceed with all convenient speed to Cardiff, and there load from the factors of the freighters a full cargo of coals, *in the customary manner*, no time being mentioned:—Held, that this meant a loading according to the usage of

the port, and within a reasonable time, without reference to unforeseen casualties; and, consequently, the loading having been delayed for an unreasonable time, the freighters were not excused by reason of the delay having arisen from difficulties connected with the railway and the collieries, which were beyond their control. *Adams v. The Royal Mail Steam Packet Company*, 492

Duty of Owner or Master as to Stowage of Cargo.

2. Declaration against the defendants, ship-owners, for negligently and carelessly stowing salt-cake, whereby it sustained damage. Fourth plea,—that the damage complained of arose from the salt-cake being delivered by the plaintiffs in bulk and not in casks, and being shipped by the plaintiffs in bulk, and consequently stowed by the defendants in bulk and not in casks, and between and amongst other goods; and that the same was stowed in the manner in which the same was actually stowed, with the knowledge, and by the direction and license of the plaintiffs to the defendants given before and during such stowage, &c.:—Held, that this plea did not amount to an allegation that the negligent stowage of the article took place by the authority of the plaintiffs, and was no answer to the action. *Hutchinson v. Guion*, 149
3. Fifth plea,—that salt-cake was a corrosive and destructive substance, rotting casks and other substances being in contact with it, which the plaintiffs knew, but which the defendants, without any default on their part, did not know, and could not reasonably be expected to know, until after the happening of the damage complained of; that it was the duty of the plaintiffs, before or at the time of the shipment or stowage, to have informed the defendants, and to have used due and reasonable care in ascertaining that the defendants were informed of the corrosive and destructive nature of salt-cake, in order to its proper and safe stowage by them; that the plaintiffs did not so inform the defendants, or ascertain that they were so informed, but, on the contrary, improperly and negligently delivered the salt-cake to the defendants in bulk, and the plaintiffs thereby and otherwise represented to the defendants and induced them to believe, and they did reasonably believe, that the said salt-cake might be placed in contact with casks, &c.; that, under this reasonable belief, and induced as aforesaid, the defendants stowed the said salt-cake in contact with and between and amongst casks of salt provisions, being, as they reasonably believed, a safe and proper mode of stowing the same; and that afterwards, and without default of the defendants, the said salt-cake corroded, rotted, and destroyed the said casks, and the hoops thereof, and the brine therefrom damaged the salt-cake, and caused

the default in the delivery thereof complained of in the declaration.

Replication,—that salt-cake is an article of merchandise well known in trade and commerce, and the nature and properties of which are well known in trade and commerce, and is an article of merchandise commonly carried in ships, and the nature and properties of which are commonly and well known to persons carrying on the trade and business of carriers by water, and that, at the time of the shipment, the defendant well knew that the goods were salt-cake:—

Held, that the fifth plea was good, and the replication no answer to it: for, if the defendants' ignorance arose from the wilful misrepresentation of the plaintiffs, such ignorance was justifiable. *Hutchinson v. Guim*,
149

Construction of ss. 188 & 189 of the Merchant Shipping Act, 1854.

[4. A bill of lading, containing in the margin the words "not accountable for leakage or breakage," the goods taken on board being casks of wine, does not exempt the master from the ordinary condition of due care in the stowage of the casks. *Phillips v. Clark*,
881

5. "Gross negligence" is a term properly used to describe the sort of negligence for which a gratuitous bailee is responsible; it cannot properly be said of an unskilled person who does not use skill; it is only applicable where a skilled person does not use the skill he has. *Id.*]

6. The plaintiff having brought an action for wages as a seaman to an amount less than 50*l.*, together with a claim for damages for an alleged assault,—the court allowed the defendant (upon terms) to plead, in addition to others, a plea founded upon the 188th and 189th sections of the Merchant Shipping Act, 17 & 18 Vict. c. 104. *Rossi v. Grant*,
699

Seamen's Advance-Notes.

7. The master of a vessel on the eve of sailing gave one of the seamen an advance note in the following form,—“Ten days after the ship *Athlone* sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement the sum of 6*l.*, provided the said Reuben Hill shall sail in the said ship from the said port of Liverpool.”

The plaintiff, an outfitter, gave the seaman in exchange for the note 3*l.* 5*s.* in cash, and 2*l.* 15*s.* worth of wearing apparel; but he stated, in answer to a question from the court, that, if he had advanced the whole amount in cash, he would have charged a discount of 7½ per cent. The seaman having sailed with the vessel,—Held, by Cockburn, C. J., Williams, J., and Byles, J.,—dissent-

iente Willes, J.,—that the condition upon which the holder of the document was entitled to sue the maker was substantially fulfilled by giving the seaman the amount in money and money's worth. *M'Kane v. Joynton*,
218

SOMERSETSHIRE SOCIETY

See APPRENTICE.

[STATUTE OF FRAUDS.

Promise to answer for the Debt, &c., of another,—
See AGREEMENT, 6.]

STAYING PROCEEDINGS

Action for a Debt under 40s

The defendants, being indebted to the plaintiffs to the amount of 6*l.* 8*s.* 6*d.*, but insisting that they owed only 6*l.* 3*s.* 6*d.*, sent them a banker's draft for the latter sum, payable at seven days' sight. The plaintiffs procured the draft to be accepted, but wrote to the defendants, demanding the additional 5*s.*, and telling them, that, unless it was paid, they would return the draft. The defendants still refusing to pay the 5*s.*, the plaintiffs, retaining the draft, issued a writ for the 6*l.* 8*s.* 6*d.* The court stayed the proceedings on payment of the 5*s.*, without costs. *Stuart v. Cawse*,
737

TOLL.

See TURNPIKE ACT.

TOWN CORPORATE.

Within 9 G. 4, c. 61, s. 1.

A borough may be a "town corporate" within the licensing act, 9 G. 4, c. 61, s. 1, though it has no separate Court of Quarter Sessions. *Brown, app., Nicholson, resp.*,
468

TENDER.

Plea of.

To a common indebitatus count, the defendants pleaded, as to 10*l.* parcel, &c., that they were always ready and willing to pay the same, and before suit tendered and offered to the plaintiff to pay the same, &c.

Replication, that the said sum of 10*l.* brought into court by the defendants was not sufficient to satisfy the claim of the plaintiff in respect of the matter to which the plea was pleaded:—

Held, that the replication was bad, and the plea good. *Smith v. Manners*,
622

TRAVELLER.

Within the 18 & 19 Vict. c. 118, s. 2.

To constitute a "traveller" within the mean

ing of the 18 & 19 Viet. c. 118, s. 2, it is not necessary that the party should be journeying on business. *Atkinson, app., Sellers, resp.*, 442

TRESPASS.

Where maintainable.

1. To a declaration charging the defendant with breaking and entering upon a certain dummy or landing-stage of the plaintiffs, the same being a barge of the plaintiffs, moored to a wharf in the river Orwell, and embarking and disembarking from the same passengers and others on, to, and from divers ships and vessels, and mooring ships and vessels against the same,—the defendant pleaded that the Orwell was a public and common navigable river and common highway; that he had a right to land and was desirous of landing passengers from his steam vessel at the wharf; that the plaintiffs' dummy or landing-stage at the time when, &c., was permanently moored and fixed alongside the wharf; so that his passengers could not embark or disembark there without his vessel being moored thereto and his passengers passing over the same, &c.:—Held, on demurrer, a sufficient answer to the declaration,—the dummy appearing to be a permanent obstruction of the defendant's right to use the river as a highway, which he could only exercise by removing it or passing over it. *The Eastern Counties Railway Company v. Dorking*, 821
2. Issue having been taken upon the above and other pleas, the cause went down to trial, when it appeared that the dummy was moored to the wharf so as to rise and fall with the tide; that vessels could not if the dummy had not been there have approached the wharf at low water; and that the defendant claimed the right of landing *at all times* over the dummy:—Held, that if the plaintiffs had intended to complain of the defendant's exercise of his supposed right at times of low water, when he could not have come to the wharf if their dummy had not been there, they should have new assigned. *Id.*
3. There was evidence of a custom for barges or other vessels arriving at a wharf for the purpose of loading or unloading, to pass for that purpose over any other barge or vessel, moored alongside a wharf and thereby preventing access to it otherwise:—*Quere*, whether such custom applied to a thing like this, which was a mere landing-stage for steamboat passengers. *Id.*

TURNPIKE ACT.

Construction of.

Tolls.—By a local turnpike act (10 G. 4, c. cxxxiii.), the road was divided into three separate districts or divisions, a different set

of trustees being appointed for each. The 14th section enabled "the said trustees," or any person or persons by them appointed, to demand and take, at the turnpikes or gates erected or to be erected by virtue of the act, amongst others, a toll of 4½d. "for every horse, &c., drawing any wagon, &c., with four wheels, having the felloes of the wheels thereof of the breadth or gauge of 4½ inches." The 15th section provided that any person having paid the toll for the passing of any horse, carriage, &c., upon producing a ticket should be permitted to pass and repass toll-free through the same gate or through such other gate or gates (if any) as the ticket for such payment should free, at any time during the same day. And s. 16 enacted "that no more than one full toll should be demanded or taken for or in respect of the same horses, &c., for passing on the same day through all or any of the toll-gates, &c., along the whole line of the said roads:—" Held, that a single toll of 4½d. paid for passing a toll-gate in one of the three districts or divisions cleared all the gates in the three districts. *Johnson, app., Cuckledge, resp.*, 286

TURNPIKE ROAD.

Ownership of the Soil of

1. The Great Northern Railway Company, in 1848, purchased of the plaintiff certain freehold land adjoining a turnpike-road to be used partly for the site of their railway and works, and partly for the purpose of diverting a portion of an existing road. Having made a substituted road, the company, with the knowledge of the plaintiff and of the trustees, enclosed and took possession of the portion of the old road which had ceased by the diversion to form part of the turnpike road. The soil of the road was not noticed in the conveyance, all parties being under the impression that it was vested in the trustees.

By several acts regulating the turnpike-road, the trustees had power from time to time to purchase land for the widening of the road: but there was no evidence that the freehold of the diverted portion of the road had ever been acquired by them:—

Held, that the presumption that the soil of the road was in the plaintiff as owner of the adjoining land, was not rebutted by the local turnpike acts, so as to cast upon the plaintiff the onus of showing that the soil of the road had not been purchased by the trustees. *The Marquis of Salisbury v. The Great Northern Railway Company*, 174

2. Held, also, that the soil of the old road did not pass by the conveyance to the company; and that there was nothing in the General Turnpike Act, 3 G. 4, c. 126, or in the Railways Clauses Consolidation Act, 1845, s. 8 & 9

Vict. c. 20, to place the company in the position of the trustees of the substituted road, so as to transfer to them the soil of the old road. *The Marquis of Salisbury v. The Great Northern Railway Company*, 174

2. Held, also, that the absence of objection on the part of the plaintiff and his agents when the company took and continued in possession of the land in question, did not amount to such a consent on his part as to preclude him from re-entering, by force of the 124th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. *Id.*

4. *Seem*, that the true effect of the 124th section of the 8 & 9 Vict. c. 18, is not to prevent a claimant from bringing ejectment to establish his title, but merely to authorize the court to stay execution upon the judgment, when obtained. *Id.*

5. A portion of the land thus taken by the company was purchased by them from one Pryor. It formed part of a larger plot which was originally waste ground of the manor of H. (of which the plaintiff was lord), lying at the side of the road, but which some years before 1848 had been enclosed and was held as copyhold of the manor. In 1848 it was so held by Pryor, who conveyed it to the company under the powers of the Lands Clauses Consolidation Act, 1845, and subsequently by deed in June, 1856, the plaintiff enfranchised the land so conveyed to the company by Pryor, to hold the same to and to the use of the company:—Held, that, assuming the plaintiff to have power so to grant, the right to the soil of the road did not thereby vest in Pryor. *Id.*

UTILITY.

See LETTER-PATENT.

VENDOR AND PURCHASER.

Sufficiency of Title.

1. Where the ability of the vendor to make a good title to a portion of the premises sold depends on a doubtful question of fact or of law, the title will not be deemed a good or sufficient title as between vendor and purchaser. *Simmons v. Heseltine*, 554
2. Where, therefore, A. bought certain premises the description of which in the particulars included a stall, which was claimed by the purchaser of the adjoining house under the same vendor, and it was doubtful as a matter of fact whether the description had been corrected at the time of the sale to A. so as to exclude the stall, and as a matter of law whether the stall was included in the conveyance to the purchaser of the adjoining premises, and a court of equity had refused to decree specific performance against A.:—Held, that A. was entitled to recover back his deposit and interest, and the expenses of investigating the title, in an action against the vendor. *Id.*

WARRANTY.

Of Skill as a Workman,—See MASTER AND SERVANT.

WASTE.

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TO

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CLAIM.

Sufficiency of Description.

In a list of claimants for a county, A.'s qualification was described in the third column as "50l. occupier," and in the fourth column the property was described as being situate in "Cambridge Road:"—Held, a sufficient description: but that, at all events, if insufficient, it was amendable under the 40th section of the 6 & 7 Vict. c. 18. *Howitt, app., Stephens, resp.; Brittain, app., Wilcocks, resp.,* 30

FEE-FARM RENT.

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OFFICE.

Within 2 W. 4, c. 45, s. 27.

The military or poor knights of Windsor have not such an "office," or such an interest in

the houses occupied by them, as to entitle them to be registered for the borough, under the 2 W. 4, c. 45, s. 27. *Heartley, app., Banks, resp.,* 40

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See QUALIFICATION OF VOTER, 1.

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QUALIFICATION OF VOTER.

Occupation as Tenant, within 2 W. 4, c. 45, s. 27.

1. A., the sole lessee of a mill, took his three-sons, B., C., and D., into partnership with him in the business of paper-makers. The mill was occupied by the four jointly; and they all resided upon the premises. The rent was charged to the partnership account, in which the four shared equally (the receipts, however, being given in the name of A. alone); and the four were rated, and the rates were paid out of the partnership funds:—Held, that B., C., and D. occupied "as tenants," within the 27th section of the 2 W. 4, c. 45, s. 27. *Rogers, app., Harry, resp.,* 3

Fee-farm Rent.

2. A. and fifty other persons became entitled by purchase from certain land-tax commissioners, under the provisions of the 42 G. 3, c. 116, each to a fifty-first part of 105l. 8s. 11d. of land-tax as a fee-farm rent, 104l. 11s. 4d. of which was charged upon land belonging to one Lee, and the remainder (17s. 7d.) upon land belonging to one Rush. In the (919)

fourth column of the list of voters, the name of Lee only was inserted as the owner of the property out of which the fee-farm rent issued, no mention being made therein of that of Rush:—Held, that, the amount of land-tax assessed upon Lee's land being sufficient to confer a right of voting upon each of the claimants, the description of the property out of which it issued was sufficient.

Cooper, resp., Ashfield, app., 16

3. *Semble*, that the qualification was well described as a "fee-farm rent," without stat-

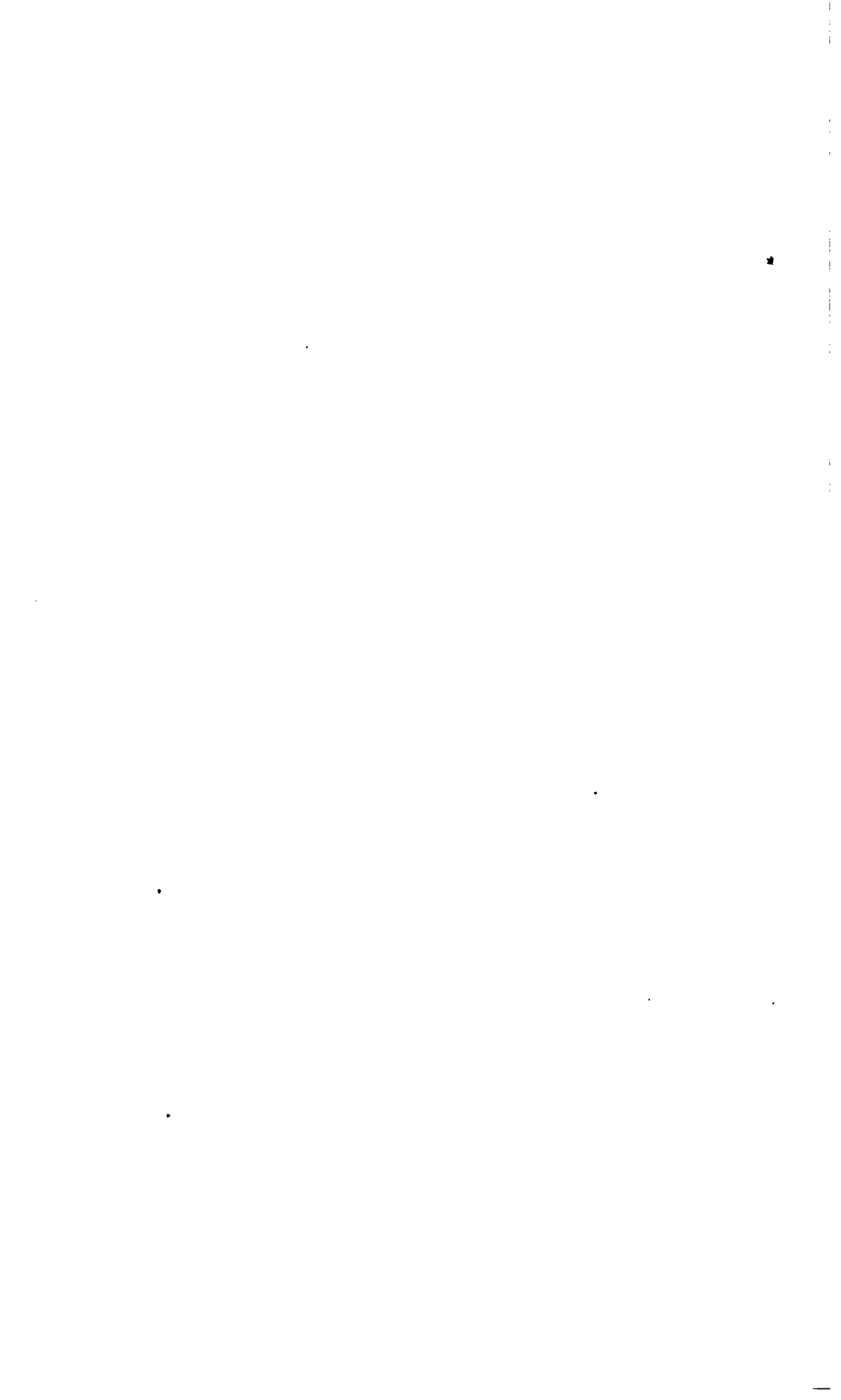
ing the proportion payable to the individual claimant, or alleging it to be an undivided part: but that, at all events, the misdescription, if any, was one which the revising barrister had power to amend, under the 6 & 7 Vict. c. 18, s. 40.

And see CLAIM.

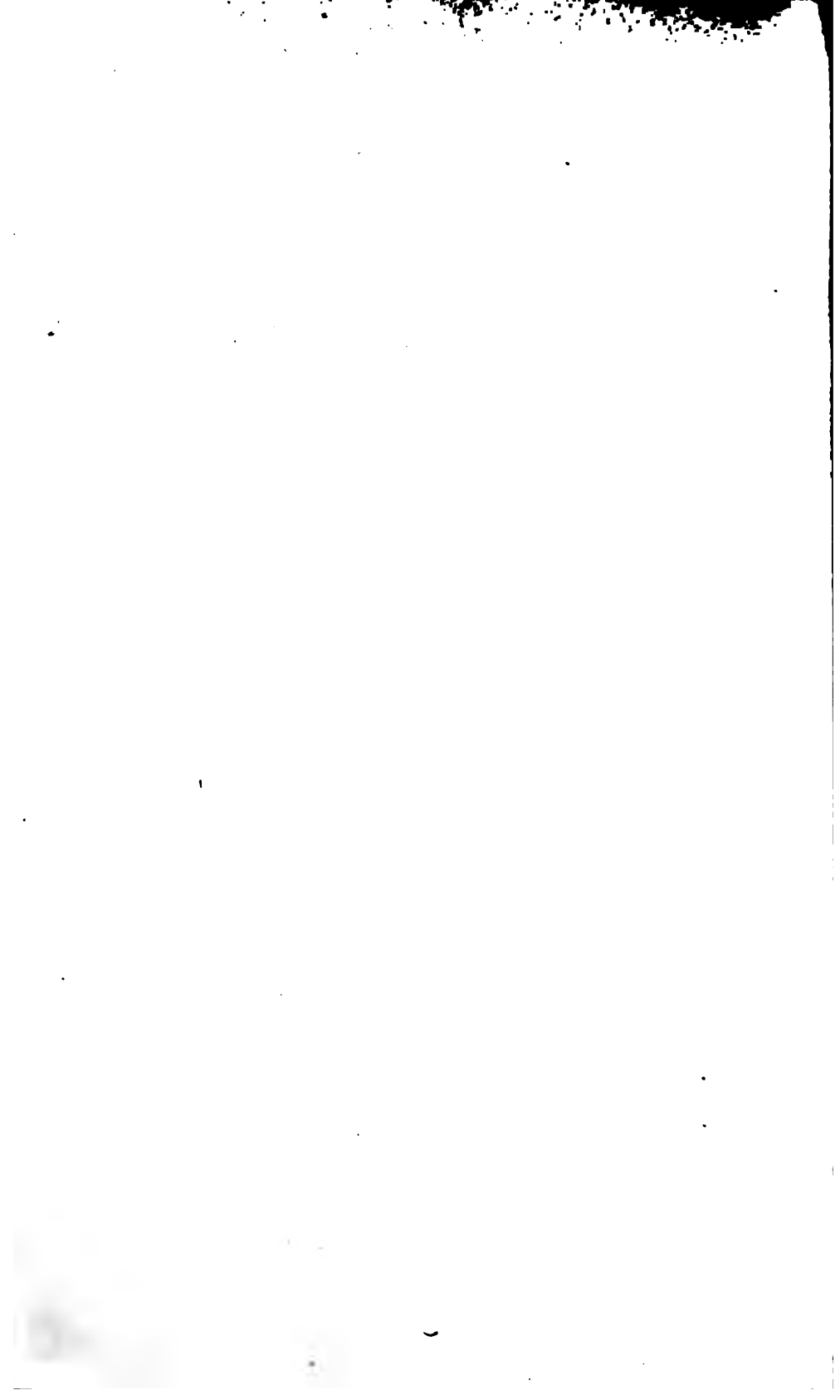
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